Supreme Court, U.S.

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No. 06-____

IN THE

Supreme Court of the United States

NICHOLAS PAPPAS, ET AL.,

Petitioners,

v.

GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA,

Respondent.

Petition For A Writ Of Certiorari
To the Supreme Court of the State of New York,
Appellate Division, First Department

PETITION FOR CERTIORARI

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[May 14, 2007]

QUESTIONS PRESENTED

1. Whether the Religion Clause of the First Amendment bars a civil action that will require no judicial inquiry into an ecclesiastical issue of doctrine or canonical discipline (over which civil courts lack jurisdiction), but is instead narrowly confined to seeking declaratory relief about (a) the meaning of a provision in the constitution of a hierarchical church defining the procedure to be followed in the revision of its constitution, and (b) generally applicable state statutes articulating procedures to be followed by all religious communities that have voluntarily elected to become incorporated under state law.

2. Whether the nondiscrimination principle embedded in the Religion Clause prohibits disparate treatment of religious communities when a state court confers upon the leadership of a hierarchically governed religious community an immunity (a) from a breach of a contractual obligation to follow the process for amending a church constitution clearly specified in the text of the constitution, and (b) from noncompliance with generally applicable norms setting procedures to be followed by all religious communities that voluntarily elect to become incorporated under state law.

3. In *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976), the Court required mandatory deference to hierarchy in cases involving disputes within a hierarchical church over church doctrine or discipline. In *Jones v. Wolf*, 443 U.S. 595 (1979), the Court authorized civil courts to hear and decide secular aspects of intra-church disputes according to "neutral principles of law." In view of the substantial confusion in the

lower courts about how intra-church disputes over contract and property should be handled, should this Court now address the apparent tension between *Serbian Eastern Orthodox Diocese* and *Jones v. Wolf*?

STATEMENT REGARDING PARTIES

Petitioners, plaintiffs below, include the following members of the Greek Orthodox Archdiocese of North and South America: Nicholas Pappas, Plato Anton, Evan Alevizatos Chriss, James Counelis, John S. Gikas, Peter Haikalis, Anthony Kales, Joyce Kales, George Kappos, George Karcazes, Thomas Karras, Andrew Kartalis, Dino Kristakis, Kyriakos P. Marudas, Alex P. Mekedis, William Mitchell, Spiro J. Pappas, Vasileos Pavloglou, Eustace T. Pliakas, George Pontikes, John Skandalakis, Harry Spell, Katherine Valone, and Xenophon Zapis.

The following parties, originally named plaintiffs, are no longer parties to this action, either because they withdrew from the suit or have died: George Chimples, Constantine G. Chimples, Elaine Makris Daniels, Thomas Kyrus, Constantine Lacas, Harry Magafan, Peter D. Maniatis, George Souvall, and Efthalia Makris Walsh.

Respondent Greek Orthodox Archdiocese of North and South America, also known as the Greek Orthodox Archdiocese of America (the "Archdiocese") is a non-profit corporation organized and existing since 1921 under the laws of the State of New York. It has no stockholders or parent corporation or subsidiaries in the sense of a commercial corporation. Archbishop Demetrios Trakatellis was named as a defendant in the Complaint, but was dismissed as a party by the Trial Division of the Supreme Court of New York. App. 15a.

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Petition for Writ of Certiorari

Petitioners, who are members of the Greek Orthodox Archdiocese of North and South America, respectfully ask this Court to issue a writ of certiorari to review the judgment of the First Department of the Appellate Division of the Supreme Court of New York in this case.

Opinions Below

The order and opinion of the First Department of the Appellate Division of the Supreme Court of New York, is reported at 30 A.D.3d 286, 817 N.Y.S.2d 270 (2006) and is reprinted at App.1a-3a. The subsequent order of the New York Court of Appeals, dismissing an appeal "as of right," is reported at 7 N.Y.3d 863, 857 N.E.2d 1138, 824 N.Y.S.2d 607 (2006), and is reprinted at App.4a. The later order of the New York Court of Appeals, denying leave to appeal, is reported at 8 N.Y.3d 803, 862 N.E.2d 792, 830 N.Y.S.2d 700 (2007), and is reprinted at App.4a. The decision and order of the Trial Division of the Supreme Court of New York is unreported. App. 5a-15a.

Statement of Jurisdiction

The Trial Division of the New York Supreme Court dismissed this action as barred by the First Amendment to the U.S. Constitution. App.11a-14a. It later denied Petitioners' motion to renew, which argued that the court had failed to accept as true at the dismissal stage factual allegations in the verified complaint. Neither order of the trial court has been reported. Petitioners filed a timely motion to appeal, and the First Department of the Appellate Division of the Supreme Court of New York affirmed the decision to dismiss the case on First Amendment grounds. App. 3a-4a. Petitioners filed a timely notice of appeal "as of

right" with the Court of Appeals, which dismissed the appeal. App. 4a. Petitioners also filed a timely motion for leave to appeal with the same court, but the New York Court of Appeals declined discretionary review on February 13, 2007. App. 4a. This petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

Constitutional and Statutory Provisions Involved

As applied to the States through the Fourteenth Amendment, the Religion Clause of the First Amendment provides: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof...." U.S. Const., Am. I.

Respondent is a hierarchically governed religious community that opted voluntarily to become incorporated as a religious corporation under New York Religious Corporation Law ("RCL") §15.1, (setting procedures for obtaining articles of incorporation). RCL §15.1 also sets generally applicable obligations of religious corporations such as frequency of meetings of the corporation and procedures to be followed when a religious community wishes to alter its corporate constitution or by-laws, and RCL §5 deals with adequate notice. *See also* New York Not-for-Profit Corporation Law, §102 (a)(2). The relevant parts of these statutes are reprinted in Appendix. App. 16a-20a.

Statement of the Case

Petitioners are loyal and faithful members of the respondent Greek Orthodox Archdiocese of North and South America ("Archdiocese"), which opted voluntarily to become incorporated under New York law in 1921.[1] Many petitioners

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[1] All facts set forth in the Statement are either uncontested or must be accepted as true and given the benefit of every possible favorable inference because the trial court resolved this case on a motion to dismiss. *See, e.g., Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994).

have served often in the Archdiocese's Clergy-Laity Congress ("CLC"). The regulations of the Archdiocese define the CLC as the "the highest legislative body of the Archdiocese." *Special Regulations and Uniform Parish Regulations* (1996), App. 20a. Article XI of the 1977 Charter or constitution of the Archdiocese describes this body as follows: "The Archdiocesan Clergy-Laity Congress is convened *biennially* and presided over by the Archbishop. It is concerned with all matters, *other than doctrinal and canonical*, which affect the life of the church including its unity, uniform administration, education and financial programs." App. 20a.[2]

This case involves *no ecclesiastical question of religious doctrine or canonical discipline.* On the contrary, the only relief now sought by petitioners is a declaration of their rights on two points: (1) whether the respondent has complied with provisions of state law that govern all other religious communities that have opted voluntarily – as the respondent did in 1921 – to incorporate as a religious corporation, and (2) whether recent proposed amendments to the respondent's charter comply with the contractual obligation undertaken by the Archdiocese and the Ecumenical Patriarchate when in 1977 they voluntarily adopted the following procedure for amending the corporate Charter or constitution: "The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefor arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification." 1977 Charter, Art. XXIV. App. 20a.

A joint committee of the Patriarchate and the Archdiocese drafted a revision of the 1977 charter ("Proposed

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[2] The provision of the 1977 Charter that calls for biennial meetings of the CLC complies with a requirement of state law that meetings of religious corporations shall be held either "annually or biennially." RCL, §15.1. App.17a. Under a provision of the Purported 2003 Charter, the CLC is required to meet only *once only every three years*. Petitioners challenge this provision as inconsistent with RCL, §15.1.

Patriarchal Charter"). Without giving any advance notice of this Proposed Patriarchal Charter to the delegates of the 35th CLC in 2000, *see* RCL §5, App. 16a, the Archdiocese presented the document to the 36th CLC on July 2-3, 2002, under a "statement of procedure" that noted: "A motion to reject any article or the Proposed Charter as a whole will be ruled out of order by the Chair." An overwhelming majority of delegates of the 36th CLC expressed major concerns which were reflected in more than twenty recommendations or amendments, including one "for the continuation of the time-honored laity and clergy involvement in the administration of our church." The delegates of the 36th Congress adopted a resolution requesting the Patriarchate to revise the Proposed Patriarchal Charter by "such modifications as reflect the major concerns expressed by the Archdiocesan Council, the parishes, and by this Clergy-Laity Congress...."

On January 18, 2003, the Ecumenical Patriarch sent a letter to Archbishop Demetrios along with the text of a charter ("Purported 2003 Charter"), which is described as "approved by our Modesty and our Holy and Sacred Synod, and by whose regulations the Archdiocese of America will be henceforth governed." The Purported 2003 Charter does not contain any major changes requested by the 36th Congress, including "the continuation of the time-honored laity and clergy involvement in the administration of our church."

1. *The litigation in the trial court.* These facts gave rise to litigation over the two inter-related points stated above: conformity to New York law governing all religious corporations, and adherence to the Archdiocese's contractual obligation concerning the process for amending the Charter.

A. *Conformity to state law.* Pursuant to RCL §15 the corporation or Archdiocese adopted a Constitution in 1922, and amended it in 1927, 1931, and 1977. In each instance the process of amendment included the approval of the Charter by both the CLC and the Ecumenical Patriarchate of Constantinople ("Patriarchate"). RCL §5 specifies "the process that is due" from religious corporations (e.g., written

notice embodying the proposed revisions of by-laws at the previous meeting of the body). App. 16a. Petitioners contended that the Archdiocese did not give adequate "written notice, embodying ... proposed ... amendment" to the Charter of 1977 at any meeting of the CLC prior to 2002.

B. *Adherence to promise about amendment process.* RCL, §15(1) states that religious communities may amend their Constitutions only "in such manner as the corporation will determine." App. 17a. Petitioners contend that in Article XXIV of the 1977 Charter the Archdiocese *did* determine and specify the prescribed manner for amending its constitution, and that the Archdiocese breached its promise by refusing to allow the CLC the role assigned to it by the Charter.

Petitioners seek declaratory relief on purely procedural aspects of the life of the church, under generally applicable norms that govern all other religious and not-for-profit organizations and under specific contractual terms mutually agreed upon by the Archdiocese and the Patriarchate in 1977. They challenge no doctrine and are not part of any disciplinary dispute. Yet the lower court dismissed the suit on the ground that the First Amendment bars such relief, primarily because the respondent is a hierarchical church.

2. *The decision of the appellate court.* In affirming the dismissal of petitioners' suit on First Amendment grounds, the intermediate appellate court offered this explanation:

> Although plaintiffs have standing, and although the action is not moot and does not merely seek an advisory opinion, it must be dismissed because it involves a question of internal governance of a hierarchical church (*see Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696 [1976]; *and see Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367, 369, n. 1, [1970] [Brennan, J., concurring], categorizing church government as either "hierarchical" or "congregational"; *accord Presbyterian Church v.*

> *United Presbyterian Church*, 62 N.Y.2d 110, 114, [1984], *cert. denied*, 469 U.S. 1037, [1984]). On the basis of the very charter on which plaintiffs rely, they cannot successfully dispute that the Greek Orthodox Church is hierarchical. And while it may at first appear that neutral principles of law can be applied to decide whether defendant's 1977 charter was properly amended pursuant to article XXIV thereof, if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter (*see First Presbyterian Church*, 62 N.Y.2d at 117). App. 3a.

We discuss below the constitutional errors in this cursory opinion. Petitioners, moreover, fully briefed the courts below on the importance of nondiscrimination on the basis of religion as a central value in this Court's Religion Clause jurisprudence. *See, e.g.*, *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990) and *Agostini v. Felton*, 521 U.S. 203, 231 (1997). The lower court did not discuss any of the precedents we cited, and did not even discuss the one case it cited, *Locke v. Davey*, 540 U.S. 712 (2004), which is not remotely close to the facts or issues of this case. The full text of the lower court's discussion of this argument is as follows:

> Plaintiffs contend that since the courts would intervene if members of a nonreligious not-for-profit corporation claimed that the corporation's charter had not been properly amended, a decision not to intervene in the instant dispute would improperly discriminate against religion. While plaintiffs may raise this issue of law for the first time on appeal (*see Carnegie Hall Corp. v. City Univ. of New York*, 286 A.D.2d 214, 215, 729 N.Y.S.2d 93 [2001]), their argument is

unavailing (*see Locke v. Davey*, 540 U.S. 712 [2004]). App.3a-4a.

This case affords the Court an opportunity to reinforce the value of nondiscrimination in the setting of a church autonomy case, by emphasizing that civil courts have no jurisdiction over the religious *doctrines* or canonical *discipline* of any religious community – Jewish, Christian, Muslim, Hindu, Buddhist, or other. As the Court noted in *Jones v. Wolf*, 433 U.S. 595, 603-604 (1979), civil courts may only attempt judicial resolution of *secular* aspects of intra-church disputes that are within the ken and competence of judges: contractual obligations (such as those implicated in this case) and property disputes (such as those involved in scores of cases with which the lower court is in direct conflict). See Reasons for Granting the Petition, part 2 below.

Reasons for Granting the Petition

1. Introduction.

As noted in the Statement, the narrow focus of this case is not on any ecclesiastical issue of *doctrine* or canonical *discipline* (*see, e.g., Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003)). Nor does the central issue in this case have anything to do with the hierarchical character of the Greek Orthodox Church, a red herring that the Archdiocese has, thus far successfully, urged throughout this litigation. See section 4 below. On the contrary, one of the inescapable questions presented in this case is whether *any religious body – no matter how it is governed* – has a *constitutional immunity from its contractual obligations* and a similar *immunity from generally applicable procedural norms* governing all religious communities that opt voluntarily to become incorporated as religious corporations under state law. As recent litigation relating to sexual abuse of minors by clergy sadly illustrates, civil courts must occasionally retain jurisdiction over some tort claims arising within a religious

community. *See, e.g.*, *Malicki v. Doe*, 814 So. 2d 347 (Fla. 2002). This fact alone cautions against a judicially imposed mandate of charitable immunity.

Moreover, the undisputed fact that *the Clergy-Laity Congress lacks jurisdiction over any doctrinal or canonical dispute*, *see* 1977 Charter, Article XI, App. 20a, should have made this case much easier to resolve than the Court's earlier cases involving intra-church disputes. For example, in *Watson v. Jones*, 80 U.S. (13 Wallace) 679 (1872), excommunicated members of a church refused to accept a binding ruling of the church on the application of the gospel to the issue of slavery. Unlike the dissidents in *Watson*, petitioners accept all the teachings of the church and make no attempt to seize or control any property of the church. Unlike *Order of St. Benedict v. Steinhauser*, 234 U.S. 640 (1914), this case presents no dispute over a question of an ecclesiastical requirement such as monastic discipline, but presents a question of enforcing voluntarily undertaken contractual obligations and the duty of compliance with statutory obligations of religious corporations. Unlike *Gonzalez v. Archbishop of Manila*, 280 U.S. 1 (1929), this case does not implicate the Court in the interpretation of religious doctrine such as the decision of a Catholic bishop concerning the appointment of a member of the clergy to celebrate the Mass. Unlike the Russian Orthodox who sought to oust the clergy in communion with the Patriarch of Moscow, *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960), petitioners do not seek to eject any of our leaders from a place of religious worship, either with the impermissible aid of a legislative enactment defining religious leadership or with an equally reprehensible judicial decision to the same effect. Unlike the dissidents in the local congregation in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), petitioners do not seek an unconstitutional determination by a civil court that church leaders had "departed from doctrine." Unlike *Serbian*

Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich, 426 U.S. 696 (1976), this case does not require a state court to undertake any inquiry into religious law in order to determine the validity of a canonical decision by a church tribunal to divest a bishop of his episcopal and monastic rank because of his "open defiance and rebellion against the church hierarchy."

Nevertheless, the New York courts have dismissed this lawsuit as barred on First Amendment grounds, even though, at bottom, this is nothing more than a dispute over the interpretation of a provision in the constitution of a religious corporation, adopted under RCL 15 §1, that specifies the procedure for revision or amendment of the charter. Since corporate constitutions and by-laws are contracts under New York law, this dispute can and must be resolved by the application of the same principles of contract law that govern the construction of any contract whose terms may require clarification.[3] Thus this action does not entangle the civil courts improperly in religious or theological matters beyond the competence or jurisdiction of the courts in a manner that would violate the First Amendment Religion Clause.

In section 2 we offer a few samples of dozens of cases that are in conflict with the decision below, which cannot be

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[3] Prohibition of unilateral alteration of a contract by one party without the approval of the other is implied in nearly all contracts, unless overridden by an express reservation by one or another of the contracting parties. On its face, Article XXIV of the 1977 Charter of the Archdiocese prohibits unilateral alteration of the Charter by the Ecumenical Patriarchate. Under New York law the organic documents of corporations have long been regarded as contracts. *Farmers' Loan & Trust Co. v. Aberle*, 18 Misc. 257, 262 (Sup. Ct. N.Y. County 1896), *modified*, 19 A.D. 79 (1st Dep't 1897). And New York courts expressly hold that a corporation's charter, by-laws, and rules are determinative of the procedural rights of its members. *See, e.g., Anderson v. Bd. of Dir. of Powelton Club*, 183 Misc. 2d 200, 702 N.Y.S. 2d 762 (1999). Thus in approving the Charter of 1977, both the Archdiocese and the Patriarchate voluntarily agreed to be bound by the mutual obligations expressed in Article XXIV.

reconciled with the frequent practice – explicitly authorized by this Court in *Jones v. Wolf*, 443 U.S. 595, 603 (1979) – of *construing constitutions and by-laws of religious corporations*, whether governed congregationally or hierarchically, to resolve secular issues of contract and property arising in intra-church disputes.

In section 3 we show that after *Jones v. Wolf*, 443 U.S. 595 (1979), the lower courts have produced glaringly inconsistent results, even with respect to the same religious community under virtually identical facts. The very fact that this case need not entangle courts in religious doctrine or discipline means that this case is an excellent vehicle for bringing much-needed clarification to this Court's teaching in *Jones v. Wolf*. *See* William G. Ross, "The Need for An Exclusive and Uniform Application of 'Neutral Principles' on the Adjudication of Church Property Disputes," 32 St. Louis U.L.J. 263, 265 (1987) ("inconsistency and unpredictability abound").

In section 4 we urge that the disarray noted above is due to two recurrent errors: (1) intrusion of judges into religious matters beyond their ken, competence and jurisdiction, and (2) improper abstention from exercising jurisdiction over (a) purely secular dimensions of a contract dispute involving no ecclesiastical question and (b) compliance with statutory procedures required of other religious and not-for-profit corporations. The lower court committed both errors; each is enough to grant the petition.

2. The decision of the lower court is in direct and irreconcilable conflict with decisions of other state appellate courts that have ruled that it is constitutionally permissible for civil courts to resolve a contract or property dispute by interpreting organic documents (charters, constitutions, and by-laws) of religious corporations, whether congregational or hierarchical.

Our review of state cases on intra-church disputes in this Court's decision in *Jones v. Wolf*, 433 U.S. 595 (1979),

discloses that the court below in ruling that a declaration of the meaning of Article XXIV of the 1977 Charter would violate the First Amendment, is in direct conflict with the cases cited in footnote 4 (grouped by jurisdiction), all of which ruled that inspection of church charters or constitutions and by-laws is not only permissible but often mandatory.[4]

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[4] AL: *Trinity Presbyterian Church v. Tankersley*, 374 So.2d 861 (Ala. 1979), *cert. denied* 445 U.S. 904 (1980); AR: *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 534 U.S. 945 (2001); CA: *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 152 Cal.Rptr. 854, *cert. denied*, 444 U.S. 974 (1979); *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 281 Cal. Rptr. 396, *cert. denied*, 502 U.S. 1073 (1991); *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (2004); CO: *Bishop and Diocese of Colorado v. Mote*, 716 P. 2d 85 (Colo. 1986); CT: *Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 620 A. 2d 1280 (1983); DL: *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798 (Del. 1999), *cert. denied*, 528 U.S. 1138 (2000); GA: *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979); *Jones v. Wolf*, 241 Ga. 388, 260 S.E.2d 84 (1979), *cert. denied*, 444 U.S. 1080 (1980); *Reddick v. Jones*, 251 Ga. 195, 304 S.E.2d 389 (1983); *First Born Church of The Living God, Inc. v. Bank South, N.A.*, 221 Ga. App. 739, 472 S.E.2d 469 (1996); *Srisovana v. Cambodian Buddhist Soc., Inc.*, 269 Ga.App. 600, 604 S.E.2d 637, (Ga.App. 2004); IL; *York v. First Presbyterian Church*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 454 N.E.2d 1038 (1983), *cert. denied*, 469 U.S. 820 (1984); KY: *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988); LA: *Chimney Ville Missionary Baptist Church of Garland v. Rev. Luke Johnson*, 665 So. 2d 730 (La. App. 1995); *Mount Gideon Baptist Church, Inc. v. Gerard A. Robinson.*, 812 So. 2d 758 (La. App. 2002); MD: *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983); MI: *Bennison v. Sharp*, 121 Mich.App. 705, 329 N.W. 2d 466 (1983); *Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App.105, 384 N.W. 2d 92 (1986); MN: *Basich v. Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82 (Minn. Ct. App. 1995), *cert. denied*,

For example, in *First Born Church of The Living God, Inc. v. Bank South, N.A.*, 221 Ga. App. 739, 472 S.E.2d 469 (1996), the Georgia Court of Appeals ruled that it was permissible for a civil court to inspect the *constitution* of a religious corporation to determine the party in an intra-church dispute who had control of bank assets. The Georgia court was aware of its obligation under the First Amendment to avoid "impermissible intrusion or excessive entanglement into ecclesiastical matters." 472 S.E.2d 469, 470. The Georgia court took the view that determining control of bank assets "is not of a religious nature but is secular," and that reading or construing a procedural aspect of a church constitution did "not call for the resolution of any ecclesiastical or theological dispute." *Id.* Hence the Georgia court ruled that it was permissible to decide the secular issue by determining whether the church's executive Board "duly complied with the provisions of the written *Constitution*." *Id.*

Similarly, the Georgia Supreme Court ruled in *Reddick v. Jones*, 251 Ga. 195, 304 S.E.2d 389 (1983), that civil courts may resolve intra-church disputes by "application

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519 U.S. 810 (1996); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606 (Minn. Ct. App.), *cert. denied*, 519 U.S. 870 (1996); *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1082 (2002); MS: *Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672 (Miss. 1999), *cert. denied*, 531 U.S. 821 (2000); MO: *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W. 2d 465 (Mo. 1984); NV: *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P. 2d 182 (1980); NJ: *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981); PA: *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985). The court below in this case is even at odds with two decisions of the highest court of its own state; *see First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984) (church constitution may be scrutinized to resolve a *property* dispute), and *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) (religious marriage *contract* may be scrutinized to enforce a promise contained in the contract).

of neutral principles of law such as *state statutes*, *corporate charters*, relevant deeds, and the organizational *constitutions* of denominations" 251 Ga. at 196, (emphasis added) is clearly permissible under the leading Georgia case, *Jones v. Wolf,* 244 Ga. 388, 390, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080 (1980) (citing *Crumbley v. Solomon*, 243 Ga. 343, 254 S.E.2d 330 (1979); see also *Srisovana v. Cambodian Buddhist Soc., Inc.*, 269 Ga.App. 600, 604 S.E.2d 637, (Ga.App. Sep 15, 2004); *Mount Gideon Baptist Church, Inc. v. Gerard A. Robinson.*, 812 So. 2d 758 (La. App. 2002); *Chimney Ville Missionary Baptist Church of Garland v. Rev. Luke Johnson*, 665 So. 2d 730 (La. App. 1995).

Moreover, the permissibility of inspecting organic documents of a religious corporation is not limited to congregational churches. *See, e.g., Metropolitan Philip v. Steiger*, 82 Cal.App.4th 923, 931, 98 Cal.Rptr.2d 605 (2000) (provisions in the "*constitution* of the general church" can override any right the majority of a local congregation might otherwise have to control local church property); *Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981). The direct conflict between the lower court and so many other state tribunals suffices as a sound reason to grant this petition.

3. The cumulative effect of nearly three decades of inattention by this Court to church autonomy issues is that state appellate courts that normally handle disputes over contract and property are now sharply divided over judicial resolution of intra-church disputes.

In this section we discuss the effect of the glaring conflict among state courts on four prominent mainline Protestant denominations – Presbyterians, Episcopalians, Lutherans, and Methodists – to illustrate that the lower courts are in such confusion over what to do when a local congregation leaves the national body, that the same denomination is treated differently depending on the location of a local parish in one state or another.

"Church autonomy" is a term of art commonly used to embrace two important values discussed in section 4 below: that people of all faiths and of none deserve equal enjoyment of their civil rights of contract, tort, and property, and that civil courts have no jurisdiction over religious aspects – doctrinal or disciplinary – of disputes arising within a religious community, no matter whether that community is governed hierarchically or congregationally.

Members of the Court have occasionally referred to this body of law with approval while focusing on other aspects of First Amendment jurisprudence. For example, Justice Brennan invoked the doctrine of church autonomy to explain his views on the permissibility of religious preference in hiring by religious corporations: "Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 341-342 (1987) (quoting Laycock, "Towards a General Theory of the Religion Clause: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum. L. Rev. 1373, 1382 (1981)).[5] And in an unemployment compensation case Justice Scalia expressly noted that "the government may not ... lend its power to one or the other side in controversies over religious authority or dogma." *Employment Div. of Oregon v. Smith*, 494 U.S. 872, 877 (1990) (citing *Blue Hull, supra*, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) and *Milivojevich*, *supra*).

In *Jones v. Wolf*, 443 U.S. 595 (1979), this Court ruled that states were free to apply "neutral principles of law" to disputes arising within a religious community. The hope expressed by the Court at the time was that "The neutral

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[5] This case does not present any opportunity to diminish any of the four freedoms of religious organizations to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions."

principles approach ... obviates entirely the need for an analysis or examination of ecclesiastical polity or doctrine in settling property disputes." *Id.* at 605.

For nearly three decades, however, this Court has declined to undertake plenary review of any case directly presenting an issue of church autonomy. The reality twenty-eight years after *Jones v. Wolf* is that state courts have generated utter incoherence with respect to the property rights of the same religious community. From the welter of confusion in state courts over how to resolve intra-church contract and property disputes, we have selected only a representative sample of incoherent rulings with respect to two *hierarchically governed* communities, Presbyterians and Episcopalians, and we refer to cases involving churches with hybrid polity. Before discussing these cases, we underscore that the lower court in this case is in direct and irreconcilable conflict with all of the cases in this section that took the Court's hint in *Jones v. Wolf*.

A. Presbyterian cases. Before *Jones v. Wolf*, Presbyterians used to be able to rely on the precedents of this Court, notably *Watson*[6] and *Blue Hull*,[7] that state courts handling

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[6] *Watson* involved a dispute over whether the slave-holding faction or the abolitionist faction of the Walnut Street Presbyterian Church of Louisville, Kentucky was entitled to ownership of the church. The Court ruled that in the case of a hierarchical church such as the Presbyterians, civil courts should defer to the definitive rulings of the leadership on matters of *doctrine* or *discipline*. But two other overlooked dimensions of *Watson* deserve attention. First, the Court did not make mistaken theological pronouncements on the term "hierarchical," but acknowledged that this term embraces many different forms of church polity or governance, and differing ways of defining the functions played by the clergy and the laity within these communities. Civil courts do not have a roving mandate to diminish these roles by judicial fiat. Second, the deference due to hierarchy on *doctrinal* or *canonical* disputes is equally due to congregational communities, for civil courts have no competence or jurisdiction to pronounce on the *theological* claims of contending parties in any religious community. The mere fact that Jews, Baptists, and Muslims are governed congregationally does not mean

disputes among Presbyterians would defer to the hierarchical structure of their church: *elders* gathered in a *presbytery*, which is connected to a *synod*, which is governed by an annual assembly.[8] After *Jones v. Wolf* it is anyone's guess how the issue of ownership of local church property will be determined when members disaffiliate from the church.

Thus a "large and influential body," *Watson*, 80 U.S. at 729, can no longer rely on the application of Court's precedents for an even-handed understanding of its polity by state courts. For example, in *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985), the Pennsylvania Supreme Court ruled that "disputes as to meaning of agreements on wills, trusts, *contracts*, and property ownership ... are questions of civil law and are not predicated on any religious doctrine" and

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that civil courts may police the line between Orthodox and Reform Jews, American Baptists and Southern Baptists, or Sunni and Shi'a Muslims.

[7] In *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969), this Court clarified that intra-church property disputes may not turn on whether a general church "abandoned or departed from the tenets of faith and practice it held at the time the local churches affiliated with it." *Id.* at 441. Congregationally governed communities, such as Jews, Baptists, or Muslims, do not have a relationship to a body that is "higher" than the local community, but the underlying principle that civil courts do not police "departures from doctrine" is equally applicable to congregationally governed communities.

[8] Presbyterians regard the presbyterial or synodical structure of church governance as a teaching that is divinely mandated. *See John Calvin: Institutes of Christian Religion* 1053-84 (McNeil ed. 1960). But that does not mean that civil courts have any business evaluating theological claims of this sort. In any event, there is no dispute over *doctrine* or *discipline* in this case. As *Watson* itself teaches, deference to hierarchy does not extinguish the civil rights of members of churches to evenhanded adjudication of their civil claims in contract, tort, and property. *See Watson*, 80 U.S. 679, 731 (1872).

hence the question of what the parties agreed to, or whether they agreed at all, are "not doctrinal and can be solved without intruding into the sacred precincts" of "ecclesiastical questions." *Id.*, 507 Pa. at 262. As to such questions, the court adopted the nondiscrimination principle, expressly holding what the lower court in *Pappas* rejected, that courts should "apply the same principles of law as would apply to nonreligious associations." *Id.* When the Pennsylvania Court inspected the deed, it found no express trust in favor of the national denomination, and ruled that a dissident local congregation should retain control of the church property. *See also Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 534 U.S. 945 (2001); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 281 Cal. Rptr. 396, *cert. denied*, 502 U.S. 1073 (1991); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W. 2d 465 (Mo. 1984); *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984); *York v. First Presbyterian Church*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Jones v. Wolf*, 241 Ga. 388, 260 S.E.2d 84 (1979), cert. denied, 444 U.S. 1080 (1980); *Presbytery of Riverside v. Community Church of Palm Springs*, 89 Cal.App.3d 910, 152 Cal.Rptr. 854, cert. denied, 444 U.S. 974 (1979); *and Trinity Presbyterian Church v. Tankersley*, 374 So.2d 861 (Ala. 1979), cert. denied 445 U.S. 904 (1980).

On the other hand, the Maryland Court of Appeals applied the "neutral principles of law" approach to reach the opposite conclusion: that in the event of a secession of a local parish from the United Presbyterian Church, the property should be awarded to the presbytery. *Presbytery of Baltimore of United Presbyterian Church v. Babcock Memorial Presbyterian Church*, 52 Md. App. 428, 449 A.2d 1190 (1982); *aff'd* 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984); *see also Calvary Presbyterian*

Church v. Presbytery of Lake Huron, 148 Mich.App. 105, 384 N.W. 2d 92 (1986).

The national Presbyterian church deserves greater clarity from state courts than incoherent determinations that flop one way on the north and the other way on the south of the Mason-Dixon line,[9] and one way on the east shore and the other way on the west shore of Lake Michigan.[10]

B. Episcopal cases. Civil courts should have nothing to say about ecclesiastical decisions concerning fitness for the ministry, such as those now dividing Episcopalians.[11] *See, e.g., McDonnell v. Episcopal Diocese of Georgia*, 191 Ga. App. 174, 381 S.E.2d 126, *cert. denied*, 493 U.S. 935 (1989). But courts must sometimes resolve secular disputes such as ownership of church property after a schism has occurred. Like Presbyterians, Episcopalians can no longer rely on a uniform approach among State courts in the disposition of church property when a local parish decides to leave the national body. As with the Presbyterians cases, the Episcopal church cases are in direct conflict with the lower court in *Pappas* on whether a court may interpret the *constitution* of a hierarchical religious community when they decide a secular claim.

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[9] Compare *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985) (disputed property goes to local congregation leaving the national denomination), with *Babcock Memorial v. Presbytery of Baltimore*, 464 A. 2d 1008 (Md. 1983) (disputed property goes to the national denomination).

[10] *Compare York v. First Presbyterian Church of Anna*, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985) (disputed property goes to local congregation leaving the national denomination) *with Calvary Presbyterian Church v. Presbytery of Lake Huron*, 148 Mich. App.105, 384 N.W. 2d 92 (1986) (disputed property goes to the national denomination).

[11] *See, e.g*, Rebecca Trounson, "Episcopal-Anglican rift deepens. U.S. bishops say no to a key demand." *Los Angeles Times* (Mar. 22, 2007).

In *Bjorkman v. Protestant Episcopal Church in the United States of America*, 759 S.W. 2d 583 (Ky. 1988), the Supreme Court of Kentucky affirmed a judgment in favor of a local parish seeking to split off from the Episcopal Church to join the Anglican Catholic Church. This outcome is not the source of conflict with the lower court decision in *Pappas*, which involves no dispute over property. The conflict between the lower court in this case and *Bjorkman* and all of the other cases discussed in this section of the petition is that – ever since this Court's specific direction in *Jones v. Wolf* – many courts have regularly reviewed a church's *constitution* without any thought that doing so was impermissible under the First Amendment. 759 S.W. 2d at 587. *See also Protestant Episcopal Church v. Barker*, 115 Cal. App. 3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981).

Other courts are directly in conflict with the outcome in *Bjorkman*, but not with the methodology of scrutinizing a church's constitution. For example, in *Bennison v. Sharp*, 121 Mich.App. 705, 329 N.W. 2d 466 (1983) the intermediate appellate court in Michigan held on virtually identical facts that the hierarchical form of governance of the Episcopal Church affects the determination not only of spiritual matters, but also of property ownership. Thus both *Bennison* as well as *Bjorkman* are in direct conflict with the lower court in the instant case, because both courts reviewed the church's *articles of incorporation* and canons.

Similarly, the New Jersey Supreme Court also ruled in favor of the Episcopal Church when a local Episcopal parish attempted to sever its ties with the national body. *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981). The *Graves* court analyzed the facts in terms of deference due to a hierarchically governed community under *Watson v. Jones, supra*. But it also undertook an analysis of "neutral principles of law" which led to the same conclusion. So the lower court in *Pappas* is also in conflict with *Graves*, which not only inspected the deed of property – which ran to the local parish without any language

of an express trust in favor of the Episcopal Church or any reverter clause to the Church – but also evaluated the *constitution* and canons of the Episcopal Church that require Diocesan approval of the sale of a parish church. Indeed, it was on this basis – which the New York court deemed constitutionally impermissible – that the New Jersey court ruled that the Episcopal Church and not the local parish was entitled to the property in dispute. *See also Bishop and Diocese of Colorado v. Mote*, 716 P. 2d 85 (Colo. 1986) (accord, but rejecting *Watson* "deference" and relying exclusively on "neutral principles of law"); *Rector, Wardens, and Vestrymen v. Episcopal Church*, 224 Conn. 797, 620 A. 2d 1280 (1983) (accord; relying on *Watson*); and *Tea v. Protestant Episcopal Church*, 96 Nev. 399, 610 P. 2d 182 (1980) (accord; relying on *Watson*).

The result in *Bjorkman* might have been unthinkable under *Watson v. Jones*, but is now a frequent result after *Jones v. Wolf*. The results in *Bennison, Graves, Mote, Rector*, and *Tea* would have been obvious under *Watson v. Jones*; they have now become clouded and dubious after *Jones v. Wolf*. In the current state of affairs, the Episcopal Church cannot now trust that a uniform national rule will acknowledge that the property of Episcopal churches will remain within the control of the diocese if a dissident parish decides to disaffiliate from the diocese or the national church.

C. Churches with hybrid polities. The bright line drawn by the Court between congregational and hierarchical forms of governance suitably describes many, but by no means all religious communities. For example, Lutheran bishops play a vital role of supervision of the church, but local congregations determine the call of a pastor to their local church. Methodist bishops play a vital role in the assignment of clergy, but a Methodist "annual conference" is not like a Roman Catholic or an Episcopal "diocese." Nothing in this petition should be read to interfere with the freedom of Lutherans to be distinctively Lutheran, or of Methodists to be authentically Methodist. The whole point of the First

Amendment is that civil courts cannot and should not become experts in the niceties of ecclesiology or any other aspect of religious belief and practice. The very fact that neither Lutherans[12] nor Methodists[13] have escaped the ambiguity that now characterizes the jurisprudence of state courts after *Jones v. Wolf* is another reason for the Court to grapple freshly with the problem of church autonomy in a way that moves beyond prior bifurcations and gives to lower courts sounder guidance for the disposition of intra-church disputes.

From 1979 to the present, the Court has not granted plenary review in any case squarely presenting an issue of church autonomy. From reading all of the petitions from OT 1978 to the present, we appreciate that not all of the questions presented to the Court were worthy of review. Many of the petitions between 1979 and 2007 were not drafted with attention to the Court's classic explanation of certworthiness: split of authority among the federal circuit

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[12] *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436 (Minn. Ct. App. 2001), *cert. denied*, 534 U.S. 1082 (2002); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606 (Minn. Ct. App.), *cert. denied*, 519 U.S. 870 (1996); *Basich v. Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82 (Minn. Ct. App. 1995), *cert. denied*, 519 U.S. 810 (1996); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 73 Ill. Dec. 789, 454 N.E.2d 1038 (1st Dist. 1983), *cert. denied*, 469 U.S. 820 (1984).

[13] *California-Nevada Annual Conference of the United Methodist Church v. St. Luke's United Methodist Church* 121 Cal.App.4th 754, 17 Cal.Rptr.3d 442 (2004); *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404 (Iowa), *cert. denied*, 540 U.S. 977 (2003); *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798 (Del. 1999), *cert. denied*, 528 U.S. 1138 (2000); *New York Annual Conference of United Methodist Church v. Fisher*, 182 Conn. 272, 438 A.2d 62 (1980); *see also Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672 (Miss. 1999), *cert. denied*, 531 U.S. 821 (2000).

courts or among state appellate courts on the same federal question. *See* Rule 10, Rules of the Supreme Court.

Many of the petitions, however, disclose questions of great moment not only to the particular communities affected by judicial imposition of meaning and value upon their religious faith and practice, but also a pattern of constitutional error going unchecked by this Court. The incoherence of state court dispositions of intra-church disputes has now become a serious burden on the free exercise of religion because churches cannot protect their own property from arbitrary disposition by courts. The Court should grant the petition to clarify the standards governing judicial disposition of intra-church disputes over secular matters such as contracts and property.

4. The decision of the lower court departs from this Court's broad command against jurisdiction of civil courts over religious aspects – doctrinal or disciplinary – of disputes arising within a religious community, no matter how that community is governed, hierarchically or congregationally, and this Court's constant teaching that in intra-church disputes all persons – irrespective of their religious beliefs and practices – deserve to be protected in the evenhanded enjoyment of their civil rights of contract, tort, and property.

The lower court in this case departed from the clear teaching of the Court on church autonomy in two ways, by making an unnecessary and erroneous theological judgment that was beyond its competence and jurisdiction, and by refusing to grant evenhanded enforcement of contract rights similar to those enjoyed by members of congregationally governed religious communities (such as Jews, Baptists, and Muslims) or by members of secular not-for-profit corporations (such as New York University or the Metropolitan Museum of Art).

A. <u>The duty to refrain from adjudicating theological claims</u>. In the single paragraph setting forth its First Amendment

analysis, the lower court correctly noted that the church to which all of the petitioners faithfully adhere is a hierarchical church: "On the basis of the very charter on which plaintiffs rely, they cannot successfully dispute that the Greek Orthodox Church is hierarchical." App. 3a. We have never disputed the fact that the church is hierarchical, which has not ever been at issue.[14] It is the lower court's sweeping and constitutionally impermissible inference from this fact that necessitates this petition.

The lower court began the crucial sentence at issue in this petition as follows: "it may at first appear that neutral principles of law can be applied to decide whether defendant's 1977 charter was properly amended pursuant to article XXIV thereof...." App. 3a. This part of the sentence makes sense for three reasons. First, a plain reading of the terms of Article XXIV leads to the conclusion that it is a straightforward procedural mechanism that directs that the Charter may not be amended unilaterally. Second, one of the most basic "settled expectations" of contracts is that they may not be altered unilaterally by one party; for example, neither a seller nor a buyer may alter crucial terms of a commercial contract without express language authorizing such changes. Third, the lower court's acceptance of the utility of the "neutral principles of law" approach recommended by this Court in *Jones v. Wolf*, is, in fact grounded in decisions of the New York Court of Appeals adopting this approach both in disputes over the meaning of a

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[14] Neither are any *canonical matters* at issue in this case. Petitioners, moreover, have never objected to the renaming of various ecclesiastical positions, changing of diocesan boundaries, rules about monasteries, or other matters of a purely ecclesiastical character. The only issue here is whether the Archdiocese may proceed with a new Charter about such matters without the requisite deliberative process of the CLC and without compliance with New York corporation law to which the church is subject, such as standard elements of due process, including adequate notice to the delegates of the CLC.

religious contract in a *congregationally* governed community, *Avitzur v. Avitzur*, 58 N.Y.2d 108,115 (1983) (enforcing promise in Jewish *ketubah* or wedding contract) and in intra-church disputes over *property* in a *hierarchical church*, *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 464 N.E.2d 454 (1984).

Curiously, however, the lower court concluded: "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." App. 3a. There are several reasons why this conclusion is erroneous. First, it is a speculative guess about future behavior of the CLC that has no basis whatever in the record. For all we know, the CLC might readily reach accord on the purported 2003 Charter if it were properly submitted to it for open discussion and deliberation in compliance with the promise of Article XXIV and applicable New York state law governing religious corporations. Second, it completely overlooks the fact that the CLC has no jurisdiction whatever over doctrinal or canonical matters of the church. *See* Art. XI of 1977 Charter, App. 20a. Third, it overlooks the fact that the Archdiocese and the Patriarchate knowingly and voluntarily agreed to be bound by the procedure for charter amendment they accepted in Article XXIV. Fourth, the lower court compounded its constitutional error that courts may not interpret the constitution of a religious corporation by grounding this erroneous conclusion on a *theological* claim at variance with the history and traditions of Eastern Orthodoxy. Whether the Ecumenical Patriarchate has legitimate authority to do what the lower court imagines it may do – without complying with state law or its own contractual promise in Article XXIV – is indeed a "religious matter." For this very reason the lower court had no business entering into the theological thicket and making such a naïve and provocative

theological judgment that the hierarchical nature of a church excuses it from its contractual or corporate obligations.[15]

We noted above that the *Bjorkman* court is in conflict with the lower court in *Pappas* over the methodology of inspecting a religious corporation's constitution. Lamentably, there is a dimension in which *Bjorkman* and *Pappas* are in harmony: both courts indulged in impermissible theological pronouncements beyond their ken and competence. The *Bjorkman* court opined that the relationship of the national church to the parish was "exclusively ecclesiastical" and that the local parish "was at all times in control of its temporal

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[15] In effect, the lower court created a broad judicial exemption with no statutory basis. This judge-made exemption from generally applicable obligations of religious corporations in RCL §15 proves too much for two reasons. First, the statute refers to "annual conferences" (Methodists), "presbyteries" and "synods" (Presbyterians) and to Episcopalians, Lutherans, and other Orthodox Christians, App. 17a-20a, none of whom in the logic of the lower court would have to comply with the statute. This creates a serious problem of discrimination among religions. Second, the lower court adopted a naïve misunderstanding of the term "hierarchical." This term embraces many very different forms of church polity or governance, and includes a variety of ways of defining the functions played by the clergy and the laity within these "hierarchical" communities. Many religious communities are in some sense "hierarchical" or at least have a hybrid form of governance including both hierarchical and congregational aspects. But that does not mean that these churches have identical forms of governance. For example, the beliefs and practices of church governance of the Greek Orthodox are not the same as those of Roman Catholics, Episcopalians, Methodists, Presbyterians, or Lutherans, all of whom are in some sense "hierarchical," and all of whom retain important, distinctive roles for the clergy and the laity in their churches. Civil courts do not have a roving mandate to diminish these roles by judicial fiat. This Court should correct all such deviations by clarifying that it is not the business of civil courts to make theological judgments on the polity or mode of governance of any religious community, whether "hierarchical" "or congregational." All that civil courts need to do is to stick to what the Constitution permits and requires: evenhanded treatment of all claimants of a breach of contract on secular aspects of contract law voluntarily entered into by religious communities.

affairs." 759 S.W. 2d at 587. This bifurcation of the relationship between the Episcopal Church and one of its parishes into matters temporal and matters spiritual badly misstates Episcopal ecclesiology. This misunderstanding of Episcopal polity is akin to the *Pappas* court's amateurish pronouncement on "patriarchal authority"[16] Misunderstandings of this magnitude should not be overlooked, for judges in our Republic are not supposed to be gifted at theology. *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) ("Courts are not arbiters of scriptural interpretation."). Judges are forbidden to makes forays into theology for a similar reason that prohibits schools boards from writing prayers, *Engel v. Vitale*, 370 U.S. 421 (1962): both will bungle a task that they have no business attempting. The Court should grant the petition to remind lower courts that problems of interpretation are exacerbated when outsiders view facts with blinders on. *See Corporation of Presiding Bishop v. Amos*, 487 U.S. 327 (1987).

This Court does not sit to correct myriad errors of appellate procedure (such as going beyond the record) or even

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[16] The trial court also accepted the invitation of the respondent's lawyers to enter the theological thicket, making an egregiously erroneous pronouncement that "all of [the other Orthodox churches] are essentially governed by the Ecumenical Patriarchate." App. 7a. This egregious factual misstatement is deeply offensive to the many autocephalous Orthodox churches that are emphatically *not* "essentially governed by the Ecumenical Patriarchate" of Constantinople. This illustrates one reason why such errors are of constitutional magnitude. It is no less improper for the appellate court to have speculated that the Patriarch has "authority unilaterally to grant a charter," App. 3a, without hearing from the CLC in the manner mutually agreed upon in Article XXIV. If the assertion of both lower courts about the power of the Ecumenical Patriarchate were correct, moreover, the legislature and courts of New York could have finessed a different way of wresting St. Nicholas's Cathedral in Manhattan from the Patriarch of Moscow, and this Court's labors on this matter would have turned out profoundly differently than the way they did. *See Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), and *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960).

of illogical reasoning. But when a court grounds a legal conclusion on a theological view, it commits a grave constitutional error that this Court can and should correct. No civil court in this country is constitutionally permitted to engage in the sort of theological interpretation indulged in by the lower court. *Thomas v. Review Bd. of Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) (unemployment compensation claim of religious claimant must be resolved by civil courts without engaging in impermissible judicial interpretation of religious or theological claims). This Court should grant the Petition to reassert that lower courts "are not arbiters of scriptural interpretation." *Thomas, supra, id.*

B. The duty to enforce contract obligations evenhandedly. From *Watson v. Jones,* 80 U.S. (13 Wallace) 679 (1872) to *Jones v. Wolf*, 443 U.S. 595 (1979), this Court has clarified two central teachings that are basic to our understanding of religious freedom in our society. First, all members of our society – irrespective of their religious beliefs and practices – deserve to be protected in the enjoyment of their civil rights of contract, tort, and property; these rights are neither enhanced by membership in a religious community nor diminished by nonmembership in such a community. Second, civil courts have no jurisdiction over religious aspects – whether doctrinal or disciplinary – of disputes arising within a religious community, no matter how that community is governed, hierarchically or congregationally.

Neither of these constitutional truths is dispensable. Both are necessary. The only permissible way to maintain the delicate balance needed to preserve both of these values is to insure that civil courts confine their power exclusively to secular dimensions of a conflict, whether it arises within a religious community, or a secular not-for-profit organization, or in a for-profit commercial company. The law of contract, tort, and property embody societal values enjoyed by all and do not admit of discrimination on the basis of religion. *See*

Larson v. Valente, 456 U.S. 228 (1982) ("one religious denomination cannot be officially preferred over another").

The earliest cases decided by this Court involving intra-church disputes over contracts involved legal claims for a share in the financial resources of utopian religious communities whose members were committed to holding property and all other assets in common. *See Goesele v. Bimeler*, 55 U.S. (14 Howard) 589 (1853), *Baker v. Nachtrieb*, 60 U.S. (19 Howard) 126 (1856), and *Speidel v. Henrici*, 120 U.S. 377 (1887). In these cases the Court repeatedly applied principles of contract law to resolve the secular claim of disaffected former members of these groups, without intruding upon the religious aspects of the controversy.

In *Watson v. Jones*, Justice Miller acknowledged that "When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises, as it finds them." 80 U.S., at 731. In order to keep the civil courts from straying beyond their mandate into the forbidden territory of adjudicating religious claims, Justice Miller also wrote in *Watson* that civil courts exercise no jurisdiction over a "subject matter of dispute" which is "strictly and purely ecclesiastical in its character ... a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morality required of them." *Id.* at 733. As noted above, this case does not concern any of these matters.

The lower court turned the interpretation of Article XXIV of the 1977 Charter – a procedural provision about the manner of going about charter amendment – into a "religious matter." Judges are trained to do exactly what petitioners seek in this lawsuit: read a straightforward procedural provision in a contract and statutory requirements of corporation law and say what these provisions mean. They

lack both expertise and jurisdiction to do what the respondent invited them to do: wander into the theological thicket and base their decision on the theological claim of the Archdiocese about the power of the Ecumenical Patriarchate to alter the contract unilaterally, that is, without statutorily required notice to the CLC and without open deliberation on the proposed changes of the corporate constitution (the 1977 Charter) by the CLC.

The effect of the lower court's dismissal of petitioners' claim of breach of contract and noncompliance with state corporation law is to deprive petitioners and all similarly situated persons in incorporated religious organizations of their civil right to evenhanded enforcement of contractual obligations. In a word, it is discriminatory. The Court should grant the petition to bring its jurisprudence on nondiscrimination into play in the resolution of intra-church disputes.

The logic of the lower court's decision is that *Milivojevich* requires dismissal of virtually all cases brought against a hierarchical church. This way of thinking ignores the way in which the value of nondiscrimination has come to play in free exercise cases, *see, e.g.*, *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990) (no special immunity for religion in the circumstances of a *generally applicable* norm of criminal conduct) and nonestablishment cases, *see, e.g., Agostini v. Felton,* 521 U.S. 203, 231 (1997) (financial incentive for parents to choose a sectarian school not present where "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a *nondiscriminatory* basis").

The Court should grant the petition because the lower court's opinion cannot be squared with this Court's nuanced view in its church autonomy cases that sustain two cardinal values. On the one hand, this Court's repudiation of civil court jurisdiction over doctrinal disputes or imposition of canonical discipline (e.g., removal of clergy or

excommunication of a member) is the core of its cases from *Watson* to *Milivojevich*. This teaching is well grounded in First Amendment values, and the Court should clarify that this is not limited to hierarchical communities, but extends to any religious community, no matter how they are governed.

On the other hand, ever since this Court began addressing the issue of church autonomy, it has also taught that civil courts must retain jurisdiction to enforce commonly held and generally applicable legal norms governing contracts, torts, and property. Evenhanded enforcement of these secular aspects of life is the only way that a legal system of contracts, torts, and property can survive. The rights of members of hierarchically governed communities in these matters are neither greater nor lesser than those enjoyed by members of congregationally governed communities, or for that matter, by nonbelievers. The Court should grant the petition to clarify this fundamental aspect of its teaching.

Milivojevich and *Jones v. Wolf* are not in irreconcilable tension with one another, *see Milivojevich*, 426 U.S., at 723 n. 15, and *Jones v. Wolf*, 443 U.S. at 602, but the cases in the state courts applying these precedents to intra-church disputes are now in disarray. By granting the petition, the Court can give to the state courts much-needed guidance on whether and how to resolve intra-church disputes: (1) by applying the nondiscrimination principle, and (2) by limiting their jurisdiction to dimensions of these disputes that do not involve religious or theological or canonical interpretation, and that can be resolved on the basis of legal principles – such as enforceability of promises in a religious contract, see *Avitzur v. Avitzur*, 58 N.Y.2d 108 (1983) – that have general applicability to all contract disputes. Because this case involves a tight focus on the meaning of Article XXIV of the 1977 Charter as an enforceable promise to follow mutually agreed upon process, and on generally applicable statutes on corporate governance, it is an excellent vehicle for clarifying what *Milivojevich* has in common with *Jones v. Wolf*.

Conclusion

For these reasons, petitioners request that the Court grant the petition.

Respectfully submitted,

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Appendix A
Decision of the Supreme Court of the State of New York, Appellate Division, First Department

Supreme Court, Appellate Division, First Department, N.Y.
Nicholas PAPPAS, et al.,
Plaintiffs-Appellants,

v.

The Greek Orthodox Archdiocese of North and South America, etc., et al.,
Defendants-Respondents.

30 A.D.3d 286, 817 N.Y.S.2d 270, 2006 N.Y. Slip Op. 05092 (June 22, 2006).

Background: Members of Greek Orthodox parishes brought action against religious corporation, seeking declaratory judgment with respect to validity of amendments to corporation's charter. The Supreme Court, New York County, Ira Gammerman, J.H.O., dismissed complaint, and members appealed.

Holding: The Supreme Court, Appellate Division, held that action involved a question of internal governance of a hierarchical church, and, thus, trial court lacked jurisdiction to grant relief sought.

Affirmed.

***270** Edward McGlynn Gaffney, Jr., Valparaiso, IN, of the District of Columbia Bar, admitted pro hac vice, and Windels Marx Lane & Mittendorf, LLP, New York (Robert J. Liddy of counsel), for appellants.

White & Case LLP, New York (Glenn M. Kurtz of counsel), for respondents.

Saxe, J.P., Marlow, Nardelli, Gonzalez, Sweeny, JJ.

*286 Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered September 16, 2004, in a declaratory judgment action involving the validity of the 2003 amendments to defendant religious organization's 1977 charter, dismissing the complaint pursuant to CPLR 3211 as barred by the U.S. Constitution First Amendment, unanimously affirmed, without costs. Appeals from orders, same court and J.H.O., entered on or about August 11, 2004 and December 13, 2004, which respectively denied defendant's motion to dismiss and plaintiffs' motion to renew, unanimously dismissed, without costs.

Defendant may be technically correct that its members, for corporate as opposed to religious purposes (*see Islamic Ctr. of Harrison, Inc., v. Islamic Science Found., Inc.*, 216 A.D.2d 357, 628 N.Y.S.2d 179 [1995]), are the members of the Archdiocesan Clergy-Laity Congress, which is the successor of the "governing or advisory body" that incorporated it (*see* **271 Religious Corporation Law, §15[1]). Defendant may also be correct that a plaintiff must be a member of the Congress at the time he or she files suit (*see Miller v. Miller*, 256 App. Div. 846, 9 N.Y.S. 2d 448 [1939], *affd.* 280 N.Y. 716, 21 N.E.2d 212 [1939]). However, if **287 one were to accept these arguments, defendant's members would be able to sue it only during a four- to eight-day window once every two years; and, therefore, as a practical matter, defendant's actions would be insulated from judicial review. To avoid such a result (*see Babigan v. Wachtler*, 133 Misc.2d 111, 112, 506 N.Y.S.2d 506 [1986] *affd.* 126 A.D. 2d 445, 510 N.Y.S. 2d 445, 510 N.Y.S.2d 473, [1987], *affd.* 69 N.Y.2d 1012, 517 N.Y.S.2d 905, 511 N.E.2d 49 [1987]; *Grant v. Cuomo*, 130 A.D.2d 154, 159, 518 N.Y.S.2d 105 [1987], *affd.* 73 N.Y.2d 820, 537 N.Y.S.2d 115, 534 N.E.2d 32 [1988]), we find that plaintiffs, as members of Greek Orthodox parishes, are also members of defendant (*see Dimas v. Greek Orthodox Archdiocese of Am.*, N.Y.L.J., June 17, 1999, at 31, col. 2). Nor will defendant be heard to argue that plaintiffs lack standing by reason of the 1999 amendment to its certificate of

incorporation stating that it has no members, when, thereafter, it argued that it did have members and succeeded in getting a lawsuit dismissed on that basis (*see Gale P. Elston, P.C. v. Dubois,* 18 A.D.3d 301, 303, 795 N.Y.S.2d 33 [2005]). Similarly, because plaintiffs instituted this lawsuit in February 2004, defendant cannot argue lack of standing on the basis of its July 2004 regulations stating that it is not a membership organization.

Although plaintiffs have standing, and although the action is not moot and does not merely seek an advisory opinion, it must be dismissed because it involves a question of internal governance of a hierarchical church (*see Serbian E. Orthodox Diocese v. Milivojevich,* 426 U.S. 696, 96 S.Ct. 2372, 49 L.Ed.2d 151 [1976]; *and see Maryland & Virginia Eldership of the Churches of God v. Church of God at Sharpsburg,* 396 U.S. 367, 369, n. 1, 90 S.Ct. 499, 24 L.Ed.2d 582 [1970] [Brennan, J., concurring], categorizing church government as either "hierarchical" or "congregational"; *accord Presbyterian Church v. United Presbyterian Church,* 62 N.Y.2d 110, 114, 476 N.Y.S.2d 454 [1984], *cert. denied,* 469 U.S. 1037, 105 S.Ct. 514, 83 L.Ed.2d 404 [1984]). On the basis of the very charter on which plaintiffs rely, they cannot successfully dispute that the Greek Orthodox Church is hierarchical. And while it may at first appear that neutral principles of law can be applied to decide whether defendant's 1977 charter was properly amended pursuant to article XXIV thereof, if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003-clearly, a religious matter (*see First Presbyterian Church,* 62 N.Y.2d at 117, 476 N.Y.S.2d 86, 464 N.E.2d 454).

Plaintiffs contend that since the courts would intervene if members of a nonreligious not-for-profit corporation claimed that the corporation's charter had not been properly amended, a decision not to intervene in the instant dispute would improperly discriminate against religion. While plaintiffs may

*288 raise this issue of law for the first time on appeal (*see Carnegie Hall Corp. v. City Univ. of New York,* 286 A.2d 214, 215, 729 N.Y.S.2d 93 [2001]), their argument is unavailing (*see Locke v. Davey,* 540 U.S. 712, 124 S.Ct. 1307, 158 L.Ed.2d 1 [2004]).

Appendix B
Decision of Court of Appeals of New York
Denying Motion for Leave to Appeal

Pappas v. Greek Orthodox Archdiocese of N. & S. Am.

Court of Appeals of New York
8 N.Y.3d 803, 862 N.E.2d 792, 830 N.Y.S.2d 700
(Feb. 13, 2007)

CITE TITLE AS: Pappas v. Greek Orthodox Archdiocese of N. & S. Am. 1st Dept: 30 AD3d 286
MOTIONS FOR LEAVE TO APPEAL GRANTED OR DENIED: Denied

Copr. (c) 2007, Secretary of State, State of New York.

N.Y. 2007
Pappas v. Greek Orthodox Archdiocese of N. & S. Am.

Appendix C
Decision of Court of Appeals of New York
Dismissing Appeal Sought "As of Right"

Pappas v. Greek Orthodox Archdiocese of N. & S. Am.

Court of Appeals of New York
7 N.Y.3d 863, 857 N.E.2d 1138, 824 N.Y.S.2d 607
(Oct. 19, 2006)

CITE TITLE AS: Pappas v. Greek Orthodox Archdiocese of N. & S. Am., 1st Dept: 30 AD3d 286

Appeals Dismissed on Constitutional Grounds

Copr. (c) 2007, Secretary of State, State of New York.

N.Y. 2006
Pappas v Greek Orthodox Archdiocese of N. & S. Am.

Appendix D
Decision and Order of Trial Division
of Supreme Court of New York, New York County

DECISION AND ORDER
OF THE HONORABLE IRA GAMMERMAN,
DATED AUGUST 6, 2004 [12-23]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: IRA GAMMERMAN **PART: 1A Part 27**

PAPPAS, Nicholas **INDEX NO.**

0101678/2004 **vs.**

MOTION DATE: 8/6/04

GREEK ORTHODOX ARCHDIOCESE

MOTION SEQ. NO. ____

MOTION CAL. NO. ____

The following papers, numbered 1 to ___ were read on this motion to/for _____ Pages Numbered

Notice of Motion/Order to Show Cause —Affidavits—Exhibits
Answering Affidavits—Exhibits
Replying Affidavits

CROSS-MOTION: □ Yes □ No
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.
Dated: 8/6/04
[Signed]
Ira Gammerman

Check one:

[×] FINAL DISPOSITION □ NON-FINAL DISPOSITION

Check if appropriate □ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 27

NICHOLAS PAPPAS, et al.,
Plaintiffs,

- against - Index No. 101678/04
Part Cal. No. 18741

THE GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA a/k/a THE GREEK ORTHODOX ARCHDIOCESE OF AMERICAS and DEMETRIOS TRAKATELLIS, ARCHBISHOP OF AMERICA,
Defendants.

IRA GAMMERMAN, J.H.O.:

Defendants The Greek Orthodox Archdiocese of North and South America and Demetrios Trakatellis move, pursuant to CPLR 3211, to dismiss the complaint in this action that seeks declaratory and injunctive relief.

The complaint names as defendants The Greek Orthodox Archdiocese of North and South America, also known as The Greek Orthodox Archdiocese of Americas (the Archdiocese) and Demetrios Trakatellis, Archbishop of America. The complaint was initially bought by thirty-four parishioners of various Greek Orthodox parishes of the Archdiocese throughout the United States. Three of the plaintiffs subsequently discontinued their claims, leaving thirty-one named plaintiffs remaining. Plaintiffs seek to compel the Archdiocese to govern itself pursuant to the 1977 Charter of the Greek Orthodox Archdiocese of America rather than the more recently granted Charter of 2003.

The Greek Orthodox Church is a hierarchical church in which the ultimate control and authority for all members within the church lies with the Holy Apostolic and Ecumenical Patriarchate of Constantinople (the Ecumenical Patriarchate). The Church shares a common bond and theology with other Orthodox churches, each of which is headed by a Patriarch or the equivalent, but all of which are essentially governed by the Ecumenical Patriarchate. Within the United States, the Archdiocese is the highest spiritual and governing authority of the Greek Orthodox Church for its approximately one million parishioners. The Archdiocese was incorporated in 1921 pursuant to Section 15 of the Religious Corporations Law (RCL) of the State of New York and is comprised of the Direct Archdiocesan District in New York and eight Metropolises or dioceses throughout the United States. The Archdiocese is governed by a Charter granted by the Ecumenical Patriarchate originally in 1922 and then amended in 1927, 1931, 1977 and 2003. The various amended Charters (collectively "The Charter") and, additionally, the Special Regulations and Uniform Parish Regulations, which are essentially the by-laws of a corporation, are administered by the Archbishop and the Holy Eparchial Synod which is comprised of the Archbishop and the bishops of each of the eight Metropolises. The Charter requires that an institution of the Archdiocese called the Clergy-Laity Congress convene every two or three years to decide on issues regarding the life, mission and unity of the Archdiocese with the exception of canonical and dogmatic matters. All decisions of the Clergy-Laity Congress are submitted to the Ecumenical Patriarchate for approval and ratification. When the Clergy-Laity Congress is not in session, the Archdiocesan Council can exercise the authority of the Congress when necessary.

The dispute between plaintiffs and the Archdiocese arises out of certain differences between the 1977 and the 2003 Charters. Essentially, plaintiffs allege that the 2003 Charter was improperly adopted because the Clergy-Laity Congress requested that the Ecumenical Patriarchate grant the new

Charter with certain modifications which were not included in the final Charter as granted on January 18, 2003. By this grant, the 2003 Charter superseded the earlier 1977 Charter. Further, plaintiffs allege that the Charter constitutes the by-laws of the corporation and, as such, the amended Charter of 2003 was improperly granted since there was a failure to serve notice as required by RCL § 5. The complaint seeks a judgment declaring that the 1977 Charter is the governing charter of the Archdiocese; and a mandatory injunction requiring defendants to govern the Archdiocese in accordance with the 1977 Charter.

The 2003 Charter differs from the 1977 Charter in the following manner: (1) elevating the Bishops of the Archdiocese to the Metropolitans, although their duties and rights remain largely unchanged; (2) changing the name of the Synod of Bishops to the Holy Eparchial Synod; (3) specifying additional eligibility criteria for future candidates for the office of Archbishop or Metropolitan; (4) modifying procedures for handling a vacancy in the position of Archbishop or Metropolitan; (5) specifying more detailed procedures by which the Spiritual Courts function; (6) granting authority to the Eparchial Synod to determine, in consultation with the Archdiocesan Council, the number, seat and boundaries of the Metropolises within the Archdiocese, subject to the approval of the Ecumenical Patriarchate; (7) providing for oversight of monasteries; and (8) providing a more detailed process for amending the Charter.

Defendants move to dismiss the complaint on the grounds that plaintiffs lack standing to bring the action; that the action is barred by the First Amendment of the United States Constitution; and that defendant Archbishop Trakatellis is not a proper defendant.

Notice Under RCL § 5

Plaintiffs allege that the Charter at issue here constitutes the by-laws of the corporation. As such, they allege that pursuant to RCL § 5, notice is required. The section provides, in pertinent part:

> By-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, after written notice, embodying such by-laws or amendment, has been openly given at a previous meeting and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon.

Plaintiffs assert that the qualified voters in this instance would be delegates of the 36th Clergy-Laity Congress of which eleven plaintiffs are members, and that no such notice was issued.

Defendants dispute plaintiffs' characterization of the Charter as by-laws. Defendants assert that historically, the Charters of the Archdiocese, including the 1977 Charter, were granted by the Ecumenical Patriarchate, without notice to, or approval of, any "members" as defined by the plaintiffs. According to the affidavit of Jerry Dimitriou, Executive Director of Administration for the Archdiocese, by its own terms the 1977 Charter was modified without notice by the Ecumenical Patriarchate prior to being granted. Defendants point out that the 1922 Charter states that it is a constitution, in that its title "Katastatikon" is Greek for "constitution." The 1927 Charter was similarity titled. The later Charters were entitled "Syntagma," another Greek work for "constitution."

Defendants maintain that the governance document that was adopted by the Archdiocese is the Special Regulations and Uniform Parish Regulations (the UPR), as specifically stated in the 1977 Charter: "Regulations as required to implement this charter and govern the Archdiocese shall be proposed by the Archbishop and presented to the Archdiocesan Council which shall consider, adopt, and present them to the next Archdiocesan Clergy-Laity Congress for approval," (1977 Charter, Art. XXI). Further, a court has previously interpreted the UPR as the by-laws of the Archdiocese, *Dimas v. Greek Orthodox Archdiocese for*

America, NYLJ, June 17, 1999 (Sup Ct., NY County). I find, therefore, that the Charter of the Archdiocese represents the constitution of the corporation, not its by-laws. Accordingly, notice was not required.

Standing

Only the members of a not-for-profit corporation can bring an action to compel performance of the corporation's by-laws, *Thornton v. The American Kennel Club, Inc.*, 182 AD2d 358 (1st Dept 1992). Defendants maintain that plaintiffs, while members in good standing of various parishes of the Archdiocese, are not members of the Archdiocese itself which is an ecclesiastical jurisdiction, not a parish church. Under New York's Not-for-Profit Corporation Law (NFPCL) Section 601(c) membership in a corporation is evidenced, inter alia, by any such method as prescribed in the certificate of incorporation or by-laws which specifically addresses membership in the corporation. While nothing in the Archdiocese's certificate of incorporation or by-laws addresses membership in the corporation, the by-laws do include a definition of membership in a parish (Chap II, Art V, UCR). In *Dimas v. Greek Orthodox Archdiocese of America supra* the court stated:

> a parish member is not a member of the Archdiocese, then who is? ... In the absence of any provision in the by-laws which distinguish between membership in a parish and membership in the Archdiocese, the court must conclude that the two are one and the same.

Further, in *Greek Orthodox Archdiocese of North and South America, Inc. v. Greek Orthodox American Leaders Inc.*, 1998 WL 932707 (SD NY 1998) the court noted that the Archdiocese maintains a confidential list of thousand of names and addresses generated primarily from information supplied by parishes throughout the United States. The court rejected the Archdiocese's distinction between "spiritual" and "legal" members as "splitting hairs and engaging in semantics: and held that the Archdiocese had members for the

purposes of NFPCL §621(b). Plaintiffs assert that, in light of *Dimas, supra*, defendants are collaterally estopped from asserting that parishioners are not members of the Archdiocese. However, collateral estoppel does not apply against a party that has prevailed in the previous litigation on other issues and has no incentive to appeal. In *Staatsburg Water Co. v. Staatsburg Fire District*, 72 NY2d 147 (1988), the court held that it would be "fundamentally unfair to give preclusive effect to a determination when the only incentive for one party to have litigated stemmed from the litigation's potential collateral estoppel effect." In *Dimas, supra* notwithstanding the finding that the members had standing, the Archdiocese prevailed in the litigation and had no reason to appeal. While collateral estoppel does not apply here, "religious corporations are designed for members, and courts have found that the Archdiocese does have members," *Pappas v. Demetrios*, Judgment and Order (Sup Ct, NY County Mar. 1, 2001) Index No. 114648/00, *affd on reh'g*, (Sup Ct, NY County 2001, affd 293 AD2d 427 (1st Dept. 2002), *leave to appeal granted in part and dismissed in part*, 99 NY2d 644 (2003). Therefore, plaintiffs are members of the Archdiocese and have standing to bring this action.

First Amendment

The First Amendment to the United States Constitution precludes courts from intervening in ecclesiastical matters, such as church governance, to resolve disputes involving religious organizations. As Justice Brennan, stated in *Corporation of the Presiding Bishop of the Church of Jesus Christ of the Latter-Day Saints v. Amos*, 483 US 327 (1987):

> Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious

> organizations, and these organizations must be protected by the [Free Exercise] [C]lause."

(quoting Laylock, "Towards a General Theory of the Religion Clause: The Case of Church Labor Relations and the Right to Church Autonomy," 81 Colum L. Rev. 1373 [1981]).

In a case squarely on point, *Serbian Eastern Orthodox Diocese for the U.S.A. v. Milivojevich*, 426 US 696 (1976), the Holy Assembly of the Serbian Orthodox Church (the Mother Church) reorganized one Diocese (the American-Canadian Diocese) into three Dioceses and removed and defrocked a bishop of the church who refused to recognize the reorganization. The Illinois Supreme Court ruled that the bishop's removal was arbitrary under the church's constitution and that the diocesan reorganization was beyond the scope of the Mother Church's authority to effectuate such changes without diocesan approval. The United States Supreme Court reversed the decision, stating:

> The fallacy to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes) .... Such a determination .... Frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power (within a

> Hierarchical) church so as to decide ... religious law (governing church polity) ... would violate the First Amendment in much the same manner as civil determination of religious doctrine.

(quoting *Md. & Va. Churches v. Sharpsburg Church*, 396 US 367 (Brennan, J., concurring)). The Supreme Court ruled that the Illinois Supreme Court incorrectly substituted its interpretation of the church constitution for that of the church's highest ecclesiastical tribunals, stating:

> We do not delve into the various church constitutional provisions relevant to this conclusion for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs.

In the present case, the Holy Synod of the Ecumenical Patriarchate determined that it has the power to grant the 2003 Charter without approving certain amendments. The power to decide ecclesiastical matters not explicitly stated in the Charter or regulation is expressly reserved to the Ecumenical Patriarchate, which is the supreme governing authority of the Greek Orthodox Church (1977 Charter Art. I). The substance of the Charter modifications here certainly appear to be core ecclesiastical matters. Pursuant to *Milivojevich, supra*, the courts simply do not have the authority to interfere with the manner in which churches organize the titles of their clerics, to determine the eligibility criteria for candidates for Archbishop or bishop, to oversee monasteries, or to inject the state judicial authority into the other matters raised by this action.

Plaintiffs attempt to distinguish *Milivojevich* by alleging that the Greek Orthodox Church is not a hierarchical church, since it is not one of the churches listed in Section 12 of the RCL. However, this section simply addresses the manner in which trustees of a religious corporation may sell,

mortgage or lease real property owned by the corporation, and specifics by name many, but not all, hierarchical churches. Further, the Archdiocese was incorporated pursuant to Section 15 of the RCL which applies to hierarchical churches. RCL § 15(3) states in pertinent part, that "[t]he trustees ... shall consist of the ecclesiastical administrative heads, also known as the hierarchs ..." This section also covers the Russian and Serbian Orthodox Churches, which have been determined as hierarchical by the United States Supreme Court, *see Milivojevich, supra; Kedroff v. St. Nicholas Cathedral*, 344 US 94 (1952). I do not think it can seriously be disputed that the Greek Orthodox Church is hierarchical.

Plaintiffs rely on *First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 NY2d 110 (1984) as the controlling authority in this action. That case involved the neutral principles of law doctrine under which a court can review secular documents such as deeds or by-laws and relevant state statutes when resolving a church property dispute. Plaintiffs contend that *First Presbyterian Church*, while adjudicating a property dispute between an individual parish church and its denominational church organization, did not specifically limit its applicability to property issues. However, there was nothing before the court except the issue of ownership of the church property. The court determined it could resolve this issue without intruding into matters involving church doctrine. Moreover, the cases cited by plaintiffs all involve matters which clearly do not involve ecclesiastical issues, such as defamation and breach of contract. Plaintiffs further assert that the doctrine can be applied in situations involving both civil rights as well as property rights, citing *Mays v. Burrell*, 124 AD2d 714 (2d Dept 1986). However, this action does not involve any alleged civil rights issues. Rather, it indisputably involves church governance matters in which *Milivojevich, supra*, prohibits court interference.

Archbishop Demetrios

Plaintiff has separately sued Archbishop Demetrios, seeking an injunction compelling him individually to administer the Archdiocese in accordance with the 1977 Charter and not the 2003 Charter. However, plaintiffs have alleged no actual or threatened misconduct by the Archbishop that would make him a proper party under NFPCL § 720 nor are they seeking any specific relief that the Archbishop but not the Archdiocese could provide. The only basis for maintaining the action against the Archbishop is that he is responsible for implementing the Charter, as granted to the Archdiocese.

Accordingly, it is

ORDERED that the motion to dismiss is granted and the complaint is dismissed; and it is further

ORDERED that upon presentation of the requisite papers, the Clerk is directed to enter judgment accordingly, with costs and disbursements to be taxed by the Clerk.

Dated: 8/6/04

ENTER:

_____

J.H.O.

Appendix E
Relevant Provisions of New York State Statutes

Not-For-Profit Corporation Law, § 102 (a)(2)
(a) As used in this chapter, unless the context requires, the term:
... (2) "By-laws" means the code of codes of rules adopted for the regulation or management of the affairs of the corporation irrespective of the name or names by which such rules are designated.
Comment: The definition of "by-laws" is substantially taken from § 2(c) of the Model Non-Profit Corporation Act of the American Bar Association. It includes the basic code of rules whether they be called "constitution," "constitution and by-laws," by-laws," or "charter." It is intended to cover the basic code immediately subordinate to the certificate of incorporation.

Religious Corporation Law, § 5.
By-laws may be adopted or amended, by a two-thirds vote of the qualified voters present and voting at the meeting for incorporation or at any subsequent meeting, after written notice, embodying such by-laws or amendment, has been openly given at a previous meeting and also in the notices of the meeting at which such proposed by-laws or amendment is to be acted upon.

Religious Corporation Law, § 15. Corporations with governing authority over, or advisory relations with, churches or synods, or both
1. An unincorporated diocesan convention, presbytery, classes, synod unless otherwise provided, annual or biennial conference or convention, or other governing or advisory body having jurisdiction over or relations with several or a number of churches or synods, or synods and churches, some or all of which are located in this state, may at a meeting

thereof duly held, determine to become incorporated by a designated name, and may by a plurality vote, elect not less than three nor more than fifteen persons to be the first trustees of such corporation. The presiding officer and clerk of such governing or advisory body shall execute and acknowledge a certificate stating that such proceedings were duly taken as herein provided, the name by which such corporation is to be known, and the names of such first trustees. On filing such certificate the members of such governing or advisory body and their successors shall be a corporation by the name stated in the certificate, and the persons named as trustees therein shall be the first trustees thereof.

The trustees of every incorporated governing or advisory body and their successors shall hold their offices during the pleasure of such body, which may remove them and fill vacancies in accordance with its rules and regulations. Such corporation may hold its meetings and elect its trustees annually or biennially, and may hold its first and any other meetings outside this state if any of the churches or synods governed or advised by it are located outside of this state. Such corporation may take, administer and dispose of real and personal property in and outside this state for the benefit of such governing or advisory body or of any parish, congregation, society, church, mission, synod, religious, benevolent, charitable or educational institution existing or acting under or related to it, or of any religious work or activity. Such corporation may elect the members of unincorporated or incorporated boards to carry on particular lines of religious work or activity. Such corporation may have in addition to its by-laws, a constitution; and such constitution may be adopted or amended in such manner as the corporation will determine.

2. The trustees of every incorporated governing body of the Protestant Episcopal church in the state of New York, shall consist of the bishop of the diocese, who shall be ex-officio president of the corporation; the bishop coadjutor, should there be one, who shall be ex-officio vice-president of the

corporation; and not less than three nor more than nine other persons, residents of the diocese, to be elected by the diocesan convention, and who shall hold their office for such term as shall be decided by the said convention.

Vacancies in the board of trustees, occurring by reason of death, resignation, or removal from the diocese, may be filled by the remaining trustees, until the next diocesan convention.

3. The trustees, who shall constitute the governing body of the Federated Orthodox Greek Catholic Primary Jurisdictions in America, shall consist of the ecclesiastical administrative heads, also known as the hierarchs, of the four constituent primary jurisdictions together with the dean of the preceptorial council, the chancellor and the secretary of said federation and not more than eight additional trustees, communicants of the Orthodox Greek Catholic Church, who are to be elected or appointed by said four constituent primary jurisdictions.

The term Federated Orthodox Greek Catholic Primary Jurisdictions in America, as used herein, is restricted to apply only

(a) to the jurisdiction of the Orthodox Oecumenical Patriarchate of Constantinople exercised in the Americas and all the territorial possessions and/or dependencies or protectorates of the United States of America, by its duly authorized exarch, metropolitan, archbishop or bishop,

(b) to the jurisdiction of the apostolic Orthodox Patriarchate of Antioch, exercised in the Americas and all the territorial possessions and/or dependencies or protectorates of the United States of America, by its duly authorized exarch, metropolitan, archbishop or bishop,

(c) to the jurisdiction of the Patriarchate of Moscow exercised in the Americas and all the territorial possessions and/or dependencies or protectorates of the United States of America, by its duly authorized exarch, metropolitan, archbishop or bishop.

(d) to the jurisdiction of the Patriarchate of Serbia (Jugoslavia) exercised in the Americas and all the

territorial possessions and/or dependencies or protectorates of the United States of America, by its duly authorized exarch, metropolitan, archbishop or bishop.

All other Orthodox Greek Catholic jurisdictions, bishoprics, dioceses and missions, officially and canonically in communion with and acknowledged by all four of said primary jurisdictions, if certified by the secretariat thereof as affiliated with the Federated Orthodox Greek Catholic Primary Jurisdictions in America, may incorporate or re-incorporate under this section as affiliates thereof.

4. The trustees of every incorporated governing body of the four primary jurisdictions, respectively, specified in subdivision three of this section, or of any of the affiliates of said jurisdictions, shall consist of the hierarch or ecclesiastical administrator, who shall be ex-officio president of the corporation, the chancellor of the archdiocese, the dean of the archdiocesan theological faculty or one of the members thereof, and the secretary of the archdiocese, who are to be appointed by said hierarch and to serve at his pleasure and, in addition, not less than three nor more than nine other persons, communicants of the Orthodox Church, to be elected by said governing body or by the diocesan convention; the term of such elective first trustees shall be one-third for one year, one-third for two years, and one-third for three years, respectively, and the term of office of their successors shall be three years.

5. The trustees of every incorporated governing body of the Evangelical Lutheran Church in America shall consist of not less than three nor more than thirty persons. If the constitution or by-laws of such governing body so provides, the Bishop or president, vice-president, treasurer and secretary of such governing body shall be ex-officio trustees of such governing body. The remaining trustees shall be elected by the annual or other regular convention of such governing body if it does not meet annually, and shall hold their office for such term as shall be decided by the said convention. Vacancies in the

board of trustees, occurring by reason of death, resignation or other cause, may be filled by the remaining trustees as provided in the constitution and by-laws of such governing body.

Appendix F
Excerpts from Record on Appeal

1. Relevant Provisions of the 1977 Charter of Greek Orthodox Archdiocese of North & South America [Taken from Record on Appeal, Pages 54, 57]

Article XI. The Archdiocesan Clergy-Laity Congress is convened biennially and presided over by the Archbishop. It is concerned with all matters, other than doctrinal and canonical, which affect the life of the church including its unity, uniform administration, education and financial programs....

Article XXIV. The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefor arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification.

2. Relevant Provision of the Special Regulations and Uniform Parish Regulations of the Greek Orthodox Archdiocese of North and South America (1996) [Taken from Record on Appeal, Page 76]

The Clergy-Laity Congress is the highest legislative body of the Archdiocese.

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(2)

No. 06-1517

FILED
JUL 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

NICHOLAS PAPPAS, *et al.*,

Petitioners,

v.

GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the First Amendment of the United States Constitution bar civil courts from adjudicating ecclesiastical matters of internal church governance of a hierarchical church?

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STATEMENT OF THE CASE

Petitioners seek to dictate the fashion in which the Archdiocese is governed. Church governance is a purely ecclesiastical matter that even Petitioners admit may not be reviewed by the judiciary. In an effort to avoid such bar, Petitioners simply ignore the substance of the 2003 Charter. Petitioners describe the dispute as concerning "contracts" and "corporate documents," while avoiding the fact that the alleged "contract" deals with ecclesiastical matters, such as providing for the elevation of bishops to the higher rank of Metropolitan, establishing criteria for the elevation of a priest to the position of Metropolitan or Archbishop, and setting forth rules for the oversight of monasteries. Petitioners avoid the very document they challenge because the matters it covers obviously fall outside the scope of judicial review. Indeed, recognizing the fact the courts will not operate churches, on appeal Petitioners abandoned their request for an injunction mandating governance in accordance with the 1977 Charter. Petitioners' remaining request to declare the 2003 Charter invalid, without actually barring the Archdiocese from following the Charter, seeks a purely advisory an opinion and, consequently, is not justiciable.

Petitioners' entire Complaint is premised on the incorrect allegation that the Ecumenical Patriarchate did not have the authority to grant a new Charter to the Archdiocese in 2003 without either approving certain amendments that were requested by the Clergy-Laity Congress of the Archdiocese or obtaining the approval of the Clergy-Laity Congress. The Ecumenical Patriarchate has determined that it has such authority, and nothing in the governance documents of the Archdiocese is to the contrary. The United States Supreme Court's decision in *Serbian Eastern Orthodox Diocese U.S.A.* v. *Milivojevich*, 426 U.S. 696 (1976) is directly on point and bars this action. Under the First Amendment, a plaintiff may not ask a court to substitute its judgment for that of a

hierarchical church's highest authority on matters of internal church governance, as the New York State Appellate Division, First Department, correctly held.[1] The law in this area is settled. Contrary to Petitioners' assertion, there is no conflict among the state courts on the issue.

Petitioners also argue that that judicial deference to the Ecumenical Patriarchate's interpretation of the Charter impairs the right of contract of all parishioners. *Milivojevich* is on point and controlling on this point, as well. In *Milivojevich*, the Court refused to interpret provisions of church constitutions to resolve a dispute concerning ecclesiastical matters. Moreover, as this Court acknowledged in *Watson*, all parishioners in a hierarchical church consent to be governed by the decisions of the hierarchy, and agree to be bound by those decisions.

Regardless of the constitutional infirmity of the Complaint, the controversy is now moot because the Clergy-Laity Congress has operated under the new Charter for three years. Indeed, at its biennial convention in 2004, the Clergy-Laity Congress, comprised of over 1,000 delegates, even promulgated new regulations in conformity therewith.

The Greek Orthodox Church

The Greek Orthodox Church is a hierarchical church in which the ultimate control and authority for all matters within the church rests with the Holy Apostolic and Ecumenical Patriarchate of Constantinople (the "Ecumenical Patriarchate"). The Greek Orthodox Church is one of several "autocephalous," or ecclesiastically independent, churches of the Eastern Orthodox tradition.[2] The Greek Orthodox

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1. The New York State Court of Appeals declined to hear Petitioners' appeal.

2. The Serbian, Russian and Antiochian Orthodox Churches are other examples of autocephalous Eastern Orthodox churches.

Church shares a common bond and theology with other Orthodox churches, each of which is headed by a Patriarch (or equivalent), but all of which look for guidance to the Ecumenical Patriarchate as *primus inter pares* (first among equals). The head of each autocephalous church administers that church, but only the Ecumenical Patriarchate can convene a council of the churches (comprised of all bishops) to modify church doctrine.

The Ecumenical Patriarchate is the "Mother Church" and is comprised of the Holy and Sacred Synod of the Ecumenical Patriarchate (the "Holy Synod"). The Holy Synod is the Church's highest executive body and is comprised of twelve Metropolitans from around the world presided over by the Ecumenical Patriarch.

The Archdiocese

Within the United States, the Archdiocese, through its Eparchial Synod, is the highest spiritual and governing authority of the Greek Orthodox Church. The Archdiocese oversees the administration of the Direct Archdiocesan District in New York, and eight Metropolises (or dioceses), which in turn oversee approximately 540 Greek Orthodox parishes throughout the United States. There are approximately one million Greek Orthodox faithful in the United States. The Archdiocese was incorporated in 1921 pursuant to Section 15 of the Religious Corporations Law ("RCL") of the State of New York, although it existed as an unincorporated association prior to that.

The principal governance documents of the Archdiocese are the Holy Scripture, the Sacred Traditions and Holy Canons of the Greek Orthodox Church, its Charter, and the Special Regulations and Uniform Parish Regulations ("Regulations"). The Holy Canons have been developed over

the seventeen-hundred-year history of the Church and deal with, among other things, church organization and discipline.

The Ecumenical Patriarchate granted the first Charter of the Archdiocese in 1922, and all subsequent Charters. From 1977 to 2003, the Archdiocese was governed in accordance with a Charter granted by the Ecumenical Patriarchate in 1977 (the "1977 Charter"). The 1977 Charter was superseded by the new Charter granted by the Ecumenical Patriarchate in 2003 (the "2003 Charter").

The Revision Of The Charter

The process to revise the 1977 Charter began in 1995 when Archbishop Iakovos (now deceased) appointed a charter revision committee and culminated eight years later with the grant of the 2003 Charter by the Ecumenical Patriarchate. The charter revision committee was expanded by a unanimous vote of the Clergy-Laity Congress in 1998 to include one clergy and one lay person from each diocese. In 1999, a charter committee consisting of three bishops, two priests and three lay people (including a professor of canon law) was selected by the Eparchial Synod to draft the new charter. In May 2000, in conformity with the 1998 Clergy-Laity Congress resolution, representatives of every diocese within the Archdiocese met in New York to review and comment on the draft charter. A revised draft charter was sent to the Ecumenical Patriarchate for review in July 2000. The Ecumenical Patriarchate then appointed its own charter committee and the two committees met in joint session in Constantinople on four separate occasions. After some further revisions, the proposed charter was presented at a meeting of the Archdiocesan Council in December, 2001 and shortly thereafter distributed to all parishes which provided comments on the draft.

In July 2002, following seven hours of detailed discussion in plenary session, the Clergy-Laity Congress approved a motion requesting that the Ecumenical Patriarchate grant the new charter for the Archdiocese with certain modifications to the charter set forth in separate motions. The Ecumenical Patriarchate granted the proposed charter on January 18, 2003, but did not approve several of the requested modifications.

Under both the 1977 Charter and the 2003 Charter, the institutions and structure of the Archdiocese are largely the same. Under both Charters, all canonical and ecclesiastical matters not provided for in the Charter and Regulations are determined by the Holy Synod of the Ecumenical Patriarchate. (1977 Charter Art. I; 2003 Charter Art. 1(b)) Also under both Charters, the Clergy-Laity Congress concerns itself with all matters, except for dogmatic or canonical matters, which affect the life, mission, growth and unity of the Archdiocese of America, including the uniform administration of the Archdiocesan District, the Metropolises and Parishes, and the educational programs, financial programs and philanthropic concerns of the Archdiocese. (1977 Charter Art. XI; 2003 Charter Art. 10) All decisions of the Clergy-Laity Congress are submitted to the Ecumenical Patriarchate for approval and ratification. (*Id.*) Following their approval, the decisions must be faithfully adhered to by all parishes regardless of whether or not they were represented at the Clergy-Laity Congress at which they were adopted. (*Id.*)

The only material differences between the 2003 Charter and the 1977 Charter are purely ecclesiastical. The 2003 Charter: (i) elevates the Bishops of the Archdiocese to Metropolitans, a higher status within the Church as a whole, although their duties and rights within the Archdiocese remain largely unchanged (2003 Charter, Art. 7); (ii) changes

the name of the Synod of Bishops to the Holy Eparchial Synod (*id.*, Art. 5); (iii) specifies additional eligibility criteria for future candidates for the office of Archbishop (*id.*, Art. 13); (iv) modifies procedures for handling a vacancy in the office of Archbishop or Metropolitan (*id.*, Art. 12); (v) specifies more detailed procedures by which the Spiritual Courts function (*id.*, Art. 9); (vi) grants authority to the Eparchial Synod to designate, in consultation with the Archdiocesan Council, the number, seat and boundaries of the Metropolises within the Archdiocese, subject to the approval of the Ecumenical Patriarchate (*id.*, Art. 3(a)); (vii) provides for oversight of monasteries (*id.*, Art. 21); and (viii) provides a more detailed process for amending the Charter (*id.*, Art. 25). There are no other material differences between the two Charters.

At its meeting in July 2004, the Clergy-Laity Congress adopted new regulations to conform to the changes reflected in the 2003 Charter, and those regulations have been ratified by the Ecumenical Patriarchate. The new regulations expressly acknowledge that the 2003 Charter was granted by the Ecumenical Patriarchate, and repeatedly cross-reference various articles in the 2003 Charter. The Clergy-Laity Congress did not object to or disapprove of the 2003 Charter in any manner. Thus, the Clergy-Laity Congress has accepted the 2003 Charter as the operative charter of the Archdiocese.

The Complaint

The Complaint was filed by thirty-four persons, all of whom claim to be members of certain separately incorporated Greek Orthodox parishes. In actuality, this action is being prosecuted and financed by the Orthodox Christian Laity ("OCL"), which has no affiliation with the Archdiocese or any Greek parish. Four Plaintiffs demanded dismissal when

they realized they had been included in the case, and three additional Plaintiffs have refused to join the appeal.[3]

Ignoring the fundamental notion of separation of church and state, Petitioners ask the civil courts to direct the way in which the Archdiocese governs itself. The Complaint alleges that the 2003 Charter was improperly adopted, and seeks a declaration that the 1977 Charter, and not the 2003 Charter, is the governing Charter of the Archdiocese. In addition, the Complaint seeks a mandatory injunction requiring the Archdiocese and Archbishop Demetrios to govern in accordance with the 1977 Charter, and not the 2003 Charter. Although on appeal Petitioners purported to have "abandoned" their claim for injunctive relief, such a tactic renders their proposed case non-justiciable as seeking only an advisory opinion.

The New York State Appellate Division, First Department, properly affirmed dismissal of Petitioners' Complaint on the ground that the First Amendment bars adjudication of ecclesiastical matters of internal church governance, and the New York Court of Appeals declined to hear Petitioners' appeal.

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3. Upon information and belief, since the date of the trial court's order, two additional plaintiffs have died.

REASONS FOR DENYING THE PETITION

I. Petitioners Fail To Present A Meritorious Ground For Granting Certiorari

A. The Appellate Division Applied Settled Supreme Court Precedent

1. The Appellate Division Correctly Ruled That The *Milivojevich* Decision Bars This Action

It is settled law that the First Amendment to the United States Constitution precludes civil courts from intervening in ecclesiastical matters, such as church governance, to resolve disputes involving religious organizations. *Serbian Eastern Orthodox Diocese for the U.S.A.* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. 94, 120-21 (1952). Matters of internal church government are at "the core of ecclesiastical affairs." *Milivojevich*, 426 U.S. at 721; *see Kedroff*, 344 U.S. at 116 (religious freedom encompasses the "power [of religious bodies] to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."). As this Court has noted:

> Religious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise][C]lause."

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. *Amos*, 483 U.S. 327, 341-42

(1987) (Brennan, J., concurring) (quoting Laylock, *Towards a General Theory of the Religion Clause: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1389 (1981)).

Here, there is no credible dispute that the Complaint asks the civil court to determine matters of church governance of a hierarchical church.[4] The Complaint seeks "a mandatory injunction requiring defendants to govern the Archdiocese in accordance with the 1977 Charter, not the [2003 Charter]." (Complaint at 13) Petitioners assert harm if the Archdiocese is permitted to "govern or continue to govern the Archdiocese under the [2003 Charter,] instead of the 1977 Charter" (*id.* ¶ 74), and allege that there is a genuine controversy and dispute "as to whether the 1977 Charter or the [2003 Charter] is the proper governing charter and bylaws of the Archdiocese" (*id.* ¶ 67).

Moreover, as the Appellate Division correctly decided, "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch[ate] had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." (App. 3a) The question of whether the Ecumenical Patriarchate has the power to approve the 2003 Charter without approving the separate amendments accompanying the 2003 Charter is purely an ecclesiastical matter that the Ecumenical Patriarchate is entitled to determine without interference from the courts. *See First Presbyterian Church* v. *United Presbyterian Church*, 62 N.Y.2d 110, 117, 464 N.E.2d 454, 458, 476 N.Y.S.2d 86, 90 (1984) (affirming dismissal of claims relating to right of local church to withdraw from the Presbytery because "the determination required an examination and interpretation of the authority of the

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4. Plaintiffs concede, as they must, that the Greek Orthodox Church is hierarchical. (Pet. 23)

Presbytery to permit or prevent withdrawal of a local church."); *Kedroff*, 344 U.S. at 115 (holding right of Archbishop to use and occupy cathedral was "strictly a matter of ecclesiastical government" and could not be constitutionally impaired by state statute).

This Court's decision in *Milivojevich*, which Petitioners all but ignore, is squarely on point and dispositive, as the Appellate Division correctly held. In *Milivojevich*, the Holy Assembly of the Serbian Orthodox Church (the "Mother Church") — also an Eastern Orthodox church — reorganized one Diocese (the American-Canadian Diocese) into three Dioceses and later removed and defrocked a bishop of the church who refused to recognize this Diocesan reorganization. *Milivojevich*, 426 U.S. at 703-05. A Diocesan Council of the American-Canadian Diocese submitted the proposed Diocesan reorganization to the Diocesan National Assembly, which issued a resolution repudiating the division of the Diocese into three Dioceses. *Id.* at 705. The defrocked bishop sued, seeking to enjoin the Mother Church from interfering with the assets of the Diocese (a religious corporation) and to have himself declared the true Diocesan Bishop. *Id.* at 706-07. The Illinois Supreme Court ruled that the bishop's removal was "arbitrary" because it was not done in conformity with that court's interpretation of the Church's constitution and penal code, and that the Diocesan reorganization exceeded the scope of the Mother Church's authority to effectuate such changes without Diocesan approval. *Id.* at 708.

The United States Supreme Court overturned the decision, ruling that no court can make such a determination once it is conceded that the challenged action was taken by the highest ecclesiastical tribunal of a hierarchical church. *Id.* at 708.

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible

> rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute, and impermissibly substitutes its own inquiry into church polity and resolutions based thereon of those disputes. Consistently with the First and Fourteenth Amendments "civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law (to decide such disputes). . . . Such a determination . . . frequently necessitates the interpretation of ambiguous religious law and usage. To permit civil courts to probe deeply enough into the allocation of power (within a hierarchical) church so as to decide . . . religious law (governing church polity) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine."

Id. at 708-09 (quoting *Md. & Va. Churches* v. *Sharpsburg Church*, 396 U.S. 367, 369 (1970) (Brennan, J., concurring)).

The Supreme Court ruled that the Illinois Supreme Court impermissibly substituted its interpretation of the Diocesan and Mother Church constitutions for that of the church's highest ecclesiastical tribunals "in which church law vests authority to make that interpretation." *Id.* at 721.

> We will not delve into the various church constitutional provisions relevant to this conclusion for that would repeat the error of the Illinois Supreme Court. It suffices to note that the reorganization of the Diocese involves a matter of internal church government, an issue at the core of ecclesiastical affairs; Arts. 57 and 64 of the Mother Church constitution commit such

> questions of church polity to the final province of the Holy Assembly.[5]

Id. (emphasis added). Even decisions of the highest authority of a hierarchical church that appear arbitrary (and there is no allegation that the Charter revisions here were arbitrary) must be respected by the courts. *Milivojevich*, 426 U.S. at 713-15 (rejecting any "arbitrariness" exception to the rule that "a civil court must accept the ecclesiastical decisions of church tribunals as it finds them").

Here, the Holy Synod of the Ecumenical Patriarchate has determined that it has the power to grant the 2003 Charter without approving certain requested amendments. Nothing in the 1977 Charter or the Special Regulations prevents it from doing so. (*See* 1977 Charter, Art. XXIV) Indeed, the power to decide ecclesiastical matters that are not explicitly stated in the Charter or regulations is expressly reserved to the Ecumenical Patriarchate, which is the supreme governing authority of the Greek Orthodox Church. (*Id.*, Art. I) Moreover, the 1977 Charter itself recites that the Ecumenical Patriarchate modified that Charter prior to granting it, further underscoring the Ecumenical Patriarchate's historical power to do so. (*Id.*, Art. XXIII) Petitioners cannot have a civil court impose an interpretation of the 1977 Charter directly contradictory to the Ecumenical Patriarchate's interpretation (at the behest of only a handful of the million parishioners, in a case being prosecuted for a third-party intermeddler, the OCL). The courts simply do not have authority to determine for churches how they organize the titles to be bestowed upon their clerics, the ecclesiastical jurisdiction of their archbishops, and the other matters raised in this case.

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5. Like the Ecumenical Patriarchate of the Greek Orthodox Church, the Holy Assembly is the highest authority of the Serbian Orthodox Church. *See Milivojevich*, 426 U.S. at 699.

Petitioners do not criticize or seek to overturn *Milivojevich*, nor do they assert that the lower court misapplied *Milivojevich*. Moreover, Petitioners concede that the revisions to the Charter are "of a purely ecclesiastical character." (Pet. 23, n.14) Petitioners' discussion of *Milivojevich* is limited to a single sentence in which they weakly attempt to distinguish it, asserting that this case, unlike *Milivojevich*, "does not require a state court to undertake any inquiry into religious law in order to determine the validity of a canonical decision by a church tribunal to divest a bishop of his Episcopal and monastic rank because of his 'open defiance and rebellion against the church hierarchy.'" (Pet. 8-9) Petitioners misrepresent *Milivojevich*. As here, in *Milivojevich*, the church's highest authority made certain decisions concerning the internal governance of a hierarchical church; those decisions were not solely "canonical" and were not limited to defrocking a defiant bishop, as Petitioners suggest. Indeed, Petitioners here specifically challenge a provision of the 2003 Charter addressing the determination of diocesan boundaries, the matter squarely at issue in *Milivojevich*. Furthermore, in *Milivojevich*, as here, the church's decisions were challenged on the ground that they were made in violation of the procedural provisions of the church's constitution, not the church's "religious law," and the resolution of the controversy would require the court to substitute its own interpretation of that governance document for that of the church's highest ecclesiastical authority (here, the Ecumenical Patriarchate).

Petitioners also suggest that only matters of doctrine and faith are ecclesiastical, (Pet. 7 ("[T]he narrow focus of this case is not on any ecclesiastical issue of *doctrine* or canonical *discipline*." (emphasis in original)), ignoring numerous Supreme Court decisions holding that matters of internal church governance are also ecclesiastical. *Milivojevich*, 426 U.S. at 713; *Kedroff*, 344 U.S. at 116; *Watson* v. *Jones*, 80

U.S. 679, 732-33 (1871) ("a matter which concerns theological controversy, church discipline, *ecclesiastical government*, or the conformity of the members of the church to the standard of morals required of them" is a matter "over which the civil courts exercise no jurisdiction") (emphasis added).

2. The Appellate Division Correctly Ruled That The "Neutral Principles Of Law" Doctrine Does Not Apply

Contrary to Petitioners' contention, this dispute cannot be resolved by reference solely to "neutral principles of law." *See Jones* v. *Wolf*, 443 U.S. 595, 602-03 (1979); *Presbyterian Church in the U.S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 449 (1969). Under the neutral principles of law doctrine, a court can review such secular documents as deeds, certificates of incorporation, by-laws and relevant state statutes when resolving a property dispute or purely secular matter. *First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93 (1984). If in the course of a neutral principles of law analysis, a question of religious doctrine or canon law arises, the Court must accept as binding the ruling of the highest ecclesiastical body on that issue. *Jones*, 443 U.S. at 604.

The "neutral principles of law" doctrine does not apply because the revision of the Charter that forms the basis of the Complaint does not involve any church property or other secular matter, as the Appellate Division correctly held. *See First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93; *Milivojevich*, 426 U.S. at 720 (court must accept as binding the decision of a hierarchical church that has only an "incidental effect" on property). Instead, the Charter revisions indisputably pertain to matters of purely internal governance, including elevating

the dioceses to "Metropolises" and the bishops to "Metropolitans," setting the eligibility criteria for future Archbishops, and specifying procedures for filling vacancies in the office of Archbishop or Metropolitan.

Moreover, Petitioners cannot point to any provision of the 1977 Charter that has been violated, and to which the Court could apply neutral principles of law. Petitioners' claim that the 2003 Charter is invalid rests upon the self-serving and utterly false allegation that the 1977 Charter prohibits the Ecumenical Patriarchate from modifying a proposed Charter before granting it. Article XXIV of the 1977 Charter contains no such prohibition:

> The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefore arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification.

(App. 20a) Thus, the Ecumenical Patriarchate (who granted the 1977 Charter) has simply granted permission to the Clergy-Laity Congress to request changes to the charter, which request is subject to the Ecumenical Patriarchate's approval. The only prohibition is that the Clergy-Laity Congress cannot revise the Charter without the approval of the Ecumenical Patriarchate. Contrary to Petitioners' unstated premise, the Ecumenical Patriarchate is not a "rubber stamp" who must approve a requested charter, and do so in its entirety.

Petitioners also ignore the fact that the 1977 Charter expressly recognizes the power of the Ecumenical Patriarchate, as the supreme authority, to modify a proposed charter; the 1977 Charter was itself modified by the Ecumenical Patriarchate prior to being granted: "[The 1977

Charter] was submitted to the Ecumenical Patriarchate which has studied, *modified it*, and granted it in its present form to the Archdiocese." (1977 Charter, Art. XIII (emphasis added)) Petitioners further ignore that all canonical and ecclesiastical matters not addressed by the Charter are expressly governed by the decisions of the Ecumenical Patriarchate. (*Id.*, Art. I) Therefore, any determination concerning the power and authority of the Ecumenical Patriarchate would necessarily require this Court to consider seventeen hundred years of church history and make factual findings concerning the Ecumenical Patriarchate's historical power and authority over the institutions of the church. This is precisely what the Constitution prohibits, as this Court has held on numerous occasions. *See Milivojevich*, 426 U.S. at 713; *Kedroff*, 344 U.S. at 116; *Watson* v. *Jones*, 80 U.S. at 732-33.

To understand the extent to which Petitioners' complaint is addressed to ecclesiastical, rather than secular, matters, one need only consider how Petitioners would enforce a judgment against the Archdiocese. The Petitioners would somehow have to compel the Archdiocese to remove all signage bearing the words "metropolis" and bar priests and others from addressing Bishops as Metropolitans. The court would need to set aside, and then determine for itself, the appropriate jurisdictional boundaries of a particular Diocese, set aside the election of an Archbishop or Metropolitan, and determine for the Archdiocese the criteria for elevating priests and for overseeing monasteries. These are precisely the kind of entanglements with religious affairs that the First and Fourteenth Amendments forbid. Even more disturbing, the Complaint asks a civil court to compel the clergy of the Archdiocese to disobey the directives of the Ecumenical Patriarchate on these purely ecclesiastical matters, placing them at risk of being defrocked.

Apparently recognizing that, under the First Amendment, Petitioners cannot ask a court to so govern a church,

Petitioners on appeal purported to "abandon" their claim for injunctive relief. An appellate court is not the appropriate venue for amending pleadings. Nonetheless, Petitioners' abandonment leaves a claim for an impermissible advisory opinion and, therefore, is not justiciable.

B. The Appellate Division's Decision Does Not Conflict With Decisions Of The State Appellate Courts

Contrary to Petitioners' contention, the decision below does not conflict with the decisions of other state appellate courts. Petitioners cite a litany of cases for the unremarkable proposition that courts may inspect church charters or constitutions and by-laws. (Pet. 11-12, n.4) Petitioners, however, ignore that the vast majority of those cases involved church property disputes in which the court properly applied the neutral principals of law doctrine to determine ownership of the property.[6] It is well established that civil courts may

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6. *Trinity Presbyterian Church* v. *Tankersley*, 374 So. 2d 861, 866 (Ala. 1979) ("In this case, the issues involved clearly dealt with property . . . ."); *Arkansas Presbytery of the Cumberland Presbyterian Church* v. *Hudson*, 344 Ark. 332, 334, 40 S.W.3d 301, 303 (2001) (action to quiet title); *Presbytery of Riverside* v. *Community Church of Palm Springs*, 90 Cal. App. 3d 910, 914-915, 152 Cal. Rptr. 854, 856 (1979) (action for "ejectment, recovery of property, quiet title and damages"); *Protestant Episcopal Church* v. *Barker*, 115 Cal. App. 3d 599, 604, 171 Cal. Rptr. 541, 542-43 (1981) (dispute over title to church property); *Korean United Presbyterian Church of Los Angeles* v. *Presbytery of the Pacific*, 230 Cal. App. 3d 480, 485-86, 281 Cal. Rptr. 396, 398 (1991) (dispute over ownership, use and control of church property); *California-Nevada Annual Conference of the United Methodist Church* v. *St. Luke's United Methodist Church*, 121 Cal. App. 4th 754, 761, 17 Cal. Rptr. 3d 442, 448 (2004) ("We should note here, for purposes of clarity, that the parties agreed that the subject of the litigation was the St. Luke's real property . . . ."); *Bishop and Diocese of Colorado* v. *Mote*, 716 P.2d 85, 87

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(Colo. 1986) ("dispute over the control of the real and personal property of St. Mary's Church in Denver"); *Rector, Wardens and Vestrymen* v. *Episcopal Church*, 224 Conn. 797, 799, 620 A.2d 1280, 1281 (1983) ("This appeal involves a dispute over the ownership of church property . . . ."); *East Lake Methodist Episcopal Church, Inc.* v. *Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798, 800-01 (Del. 1999) ("In this appeal . . ., we examine the legal standards that govern disputes over church property between local congregations and general ecclesiastical authorities."); *Crumbley* v. *Solomon*, 243 Ga. 343, 343, 254 S.E.2d 330, 332 (1979) ("This court is again confronted with the difficult task of resolving a church property dispute."); *Jones* v. *Wolf*, 241 Ga. 388, 388, 260 S.E.2d 84, 84 (1979) (dispute over control and use of church property); *Reddick* v. *Jones*, 251 Ga. 195, 196, 304 S.E.2d 389, 391 (1983) ("This church dispute involves property rights . . . ."); *First Born Church of the Living God, Inc.* v. *Bank South, N.A.*, 221 Ga. App. 739, 739, 472 S.E.2d 469, 470 (1996) ("dispute as to who was authorized to control certain [church] bank accounts"); *Srisovana* v. *Cambodian Buddhist Soc., Inc.*, 269 Ga. App. 600, 602, 604 S.E.2d 637, 640 (Ga. App. 2004) ("disputes involving a nonprofit corporation's board of directors as well as the disposition of church property by that board"); *York* v. *First Presbyterian Church*, 130 Ill. App. 3d 611, 612, 474 N.E.2d 716, 717 (1984) ("The central controversy involves the ownership and control of the property of Anna Church."); *Grace Evangelical Lutheran Church* v. *Lutheran Church-Missouri Synod*, 118 Ill. App. 3d 151, 154, 454 N.E.2d 1038, 1041 (1983) (dispute involving right to purchase real property); *Bjorkman* v. *Protestant Episcopal Church in the United States of America*, 759 S.W.2d 583, 584 (KY 1988) (dispute "as to the ownership of the church property"); *Mount Gideon Baptist Church, Inc.* v. *Robinson*, 812 So. 2d 758, 764 (La. App. 2002) (dispute between two rival factions over control of church, and therefore church property); *Babcock Memorial* v. *Presbytery of Baltimore*, 464 A.2d 1008, 575 (Md. 1983) ("In this case involving a dispute as to ownership and control of church property . . . ."); *Calvary Presbyterian Church* v. *Presbytery of Lake Huron*, 148 Mich. App. 105, 109, 384 N.W.2d 92, 93 (1986) (dispute over "ownership of real property"); *Benninson* v. *Sharp*, 121 Mich. App. 705, 709,

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apply neutral principles of law to decide church property disputes. *See Jones* v. *Wolf*, 443 U.S. at 602-03. As Petitioners concede, however, this case "involves no dispute over property." (Pet. 19)

Four cases cited by Petitioners in footnote 4 did not involve a church property dispute. In two of those cases, the intermediate state appellate courts applied the rule of judicial deference from *Milivojevich* and held that the controversy was not justiciable because it required an impermissible inquiry into matters of church governance.[7] One case

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329 N.W.2d 466, 468 (1983) ("This is a church property dispute . . . ."); *Shepherd of the Valley Lutheran Church* v. *Hope Lutheran Church*, 626 N.W.2d 436, 441 (Minn. Ct. App. 2001) ("[W]e may resolve the property dispute between SOTV and Hope Lutheran Church by applying neutral principles of law."); *Shirley* v. *Christian Episcopal Methodist Church*, 748 So. 2d 672, 674 (Miss. 1999) (dispute involving "title, use and possession of the church property, both real and personal"); *Presbytery of Elijah Parish Lovejoy* v. *Jaefggi*, 682 S.W.2d 465, 466 (Mo. 1984) ("The principal adversaries in this church property dispute . . . ."); *Tea* v. *Protestant Episcopal Church*, 96 Nev. 399, 400, 610 P.2d 182, 182 (1980) ("This is a declaratory judgment action to determine title to church property."); *Protestant Episcopal Church* v. *Graves*, 83 N.J. 572, 573, 417 A.2d 19, 20 (1981) ("This case involves a dispute over control of local church property."); *Presbytery of Beaver-Butler of United Presbyterian Church* v. *Middlesex Presbyterian Church*, 507 Pa. 255, 257, 489 A.2d 1317, 1318 (1985) ("This is a dispute over the ownership of church property."); *First Presbyterian Church of Schenectady* v. *United Presbyterian Church in the United States*, 62 N.Y.2d 110, 114, 464 N.E.2d 454 (1984) (dispute over "use and enjoyment of the local church property").

7. *Basich* v. *Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82, 86 (Minn. Ct. App. 1995) (pastors' claims against church for breach of contract and breach fiduciary duty were non-justiciable under the First Amendment); *Singleton* v. *Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606, 611 (Minn. Ct. App. 1996) (pastor's claims against church for breach of contract, wrongful discharge and promissory estoppel were non-justiciable under the First Amendment).

addressed the authority of a church board to ratify a contract with building contractor, a purely secular matter. *Chimney Ville Missionary Baptist Church of Garland* v. *Johnson*, 665 So. 2d 730 (La. App. 1995). In the fourth case, the court awarded specific performance of a marriage contract that required the husband to appear before a rabbinical tribunal so that his wife could obtain a decree of divorce under Jewish law. *See Avitzur* v. *Avitzur*, 58 N.Y.2d 108 (1983). That case, however, did not involve a decision from the highest authority of a hierarchical church, nor did it involve the interpretation of a church's constitution or charter. Petitioners have not cited any case in which a court reviewed a constitution or charter of a hierarchical church to determine matters of church governance.

Petitioners elevate form over substance in focusing on the nature of the document and insisting that courts can interpret church constitutions for any purpose whatsoever. The nature of the *document* is not determinative; it is the nature of the *dispute* that determines whether judicial review of a church constitution is permissible. Thus, that some courts have reviewed church constitutions in church property disputes is irrelevant. A property dispute is secular; a governance dispute is ecclesiastical. Thus, Petitioners' church property cases are not in conflict with the Appellate Division's decision.

C. The State Appellate Courts Are Not Divided On The Issue Of Church Autonomy

Petitioners chide this Court for "nearly three decades of inattention" to church autonomy issues that has led to "utter incoherence" and a "welter of confusion" in the state courts "over what to do when a local congregation leaves the national body." (Pet. 13, 15) That issue, however, is not presented here. No local parish in the Greek Orthodox church has left the Archdiocese, and there is no dispute regarding

the legal or beneficial title to any church property. Thus, even if the state appellate courts were divided (and they are not), this case does not present the facts necessary to resolve the issue.

Regardless, the state appellate courts are not "sharply divided," as Petitioners assert. (Pet. 13) Petitioners draw a false dichotomy between two types of church property cases: those that award the property to a local church, and those that award the property to a national church. The differences in outcomes in these church property cases, however, are entirely attributable to differences in the facts of each case. Indeed, Petitioners fail to point to any misapplication of a legal principle by any court, but merely focuses on the divergent results.

Petitioners' unstated premise is that application of neutral principles of law should always yield the same result, i.e., that property ownership should always be awarded to either the local church or the national church. The application of the doctrine, however, requires a review of secular documents, such as deeds and contracts, to determine ownership of property. Those facts differ from case to case. Thus, in *Presbytery of Beaver-Butler*, the Pennsylvania Supreme Court faithfully applied the neutral principles of law doctrine and ruled that the property belonged to the local church because the local church held record title and there was no equitable trust in the property created in favor of the national church. 507 Pa. at 268-69, 489 A.2d at 1324. In *Babcock Memorial Presbyterian Church*, the Maryland Supreme Court ruled that the church property belonged to the national Presbytery because that church's rules prohibited the local church from alienating its property without permission of the Presbytery. 464 A.2d at 1017. It is hardly "anyone's guess" how these church property disputes will be determined, as Petitioners cavalierly assert. (Pet. 16) For

state courts applying neutral principles of law, the outcome will depend on the application of well established property law to the facts of each case.

As Petitioners note, when deciding property disputes within a hierarchical church, some states have applied a rule of compulsory deference to the decisions of the hierarchy first articulated in *Watson*, rather than the neutral principals of law doctrine. *See, e.g.*, *Benninson* v. *Sharp*, 121 Mich. App. 705, 725, 329 N.W.2d 466, 475 (1983) (noting that outcome would be the same under neutral principals approach as under polity approach); *Protestant Episcopal Church* v. *Graves*, 83 N.J. 572, 577-80, 417 A.2d 19, 22-24 (1981) (noting that there are two generally accepted approaches to resolving church property disputes, the hierarchical (*Watson*) approach and the neutral principles of law approach, and applying hierarchical approach in absence of evidence of express trust). But those cases are consistent with *Jones* v. *Wolf*, which endorsed the neutral principals approach but refused to require states to apply a single approach. "'[A] State may adopt any one of various approaches for settling church property disputes so long as it involves no consideration of doctrinal matters, whether the ritual and liturgy of worship or the tenets of faith.'" *Jones* v. *Wolf*, 443 U.S. at 602 (quoting *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368 (1970) (Brennan, J., concurring)).[8]

Thus, the state court church property decisions are not "incoherent"; they are remarkably clear and consistent in their application of *Milivojevich*, *Jones* v. *Wolf*, and other Supreme Court cases. They uniformly adhere to the general rule that hierarchical churches may decide for themselves which entity,

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8. The New York State Court of Appeals has adopted the neutral principles of law approach. *See First Presbyterian Church*, 62 N.Y.2d at 121, 464 N.E.2d at 460, 476 N.Y.S.2d at 93 (1984).

local or national, will own church property and how that property will be treated in the event a local parish breaks from the national church.

Nor has this Court been "inattenti[ve]" to church autonomy issues. This Court has addressed these issues on numerous occasions. *See, e.g.*, *Jones* v. *Wolf*, 443 U.S. 595 (1979); *Serbian Eastern Orthodox Diocese for the United States of America and Canada* v. *Milivojevich*, 426 U.S. 696, 710 (1976); *Maryland & Virginia Eldership of the Churches of God* v. *Church of God at Sharpsburg, Inc.*, 396 U.S. 367 (1970); *Presbyterian Church* v. *Mary E. B. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969); *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94 (1952); *Watson* v. *Jones*, 80 U.S. (13 Wall.) 679 (1871). The state courts have applied these decisions consistently and fairly, demonstrating that no review is warranted here. Although Petitioners allude to other petitions for certiorari that have presented issues of "great moment," none are identified. (Pet. 22). The Court need not reexamine settled principles of law merely because the case law has reached a certain age.

D. The Appellate Division Did Not Intrude Into Religious Matters

Petitioners take issue with the Appellate Division's conclusion that "if this case were to proceed further, a trial court would ultimately be required to decide whether the Ecumenical Patriarch had authority unilaterally to grant a charter to defendant in 2003 – clearly, a religious matter." (Pet. 24 (quoting App. 3a)) Petitioners concede that this question "is indeed a religious matter." (*Id.*) They suggest, however, that such a decision might be unnecessary because the parties "might readily reach accord." (*Id.*) Idle speculation that the parties might settle is not a reason to set aside the

First Amendment. Next, Petitioners assert that this statement "completely overlooks the fact that the CLC has no jurisdiction whatever over doctrinal or canonical matters of the church." (Pet. 24) That argument is a non-sequitur.; the Appellate Division's statement concerned the Ecumenical Patriarchate's power, not the CLC's jurisdiction.

Petitioners argue that the court improperly "enter[ed] the theological thicket" by concluding that the Greek Orthodox church is hierarchical, and proceed to lecture on the subtle differences in church governance between different hierarchical churches. (Pet. 25, n.15) Petitioners, however, concede that the Greek Orthodox church is hierarchical. (Pet. 23 ("We have never disputed the fact that the church is hierarchical, which has not ever been at issue.")) Petitioners' contention is, therefore, puzzling.

Petitioners also misinterpret the Appellate Division's decision, arguing that the court made a "naïve and provocative theological judgment that the hierarchical nature of a church excuses it from its contractual or corporate obligations." (Pet. 24-25) The Appellate Division did not so rule. The court merely held that an inquiry into ecclesiastical matters of internal church governance is not justiciable. Repeatedly denigrating the Appellate Division does not advance Petitioners' position: there is nothing "naïve" or "amateurish" about the court's ruling, nor did the court proceed "with blinders on." (Pet. 24, 26) The court's ruling is entirely consistent with the settled law of this Court.

E. The Appellate Division Correctly Rejected Petitioners' "Impairment of Contract" Argument

Petitioners also argue that the Appellate Division's decision discriminates on the basis of religion. (Pet. 27) According to Petitioners theory, because the Archdiocese's

constitution is a form of a contract, the court must interpret that contract regardless of the ecclesiastical nature of its provisions or the effect of such interpretation on the internal governance of a religious organization.

Petitioners' argument is frivolous. Petitioners cite no authority to support their incorrect contention that contract law trumps the First Amendment's prohibition on governmental interference in ecclesiastical matters. To the contrary, *Milivojevich* is controlling. As discussed above, the *Milivojevich* court expressly refused to interpret the constitutions of the Diocesan and Mother Church, the same alleged "contract" at issue here. *Milivojevich*, 426 U.S. at 721 ("We will not delve into the various church constitutional provisions relevant to this conclusion for that would repeat the error of the Illinois Supreme Court."). Furthermore, the proposition that any church governance document is subject to judicial interpretation because it is a contract is absurd. The law is just the opposite; courts are not entitled to adjudicate ecclesiastical matters, even those that involve contracts.

Contrary to Petitioners' dire predictions, the Court's abstention from determining ecclesiastical matters would not result in "dismissal of virtually all cases brought against a hierarchical church." (Pet. 29) The Archdiocese has not asserted, nor did the court below find, that the Archdiocese's commercial contracts with third parties are shielded from judicial review. The First Amendment bars review of ecclesiastical matters, not commercial transactions.

Moreover, because the Greek Orthodox Church is hierarchical, all adherents consent to be governed by the hierarchy's interpretation of its own governance documents. As the *Watson* court put it:

> All who unite themselves to such a body do so with an implied consent to this government, and

> are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

80 U.S. at 729. Indeed, it is remarkable to argue that the United States Supreme Court's prohibition under *Milivojevich* discriminates against religious claimants. (Pet. 27) To the contrary, it protects religious organizations from the disgruntled few who, dissatisfied with the decisions of church leaders, run to the civil courts in an effort to impose their views on the church and all other parishioners.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the petition.

Respectfully submitted,

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No. 06-1517

IN THE

Supreme Court of the United States

NICHOLAS PAPPAS, ET AL.,

Petitioners,

v.

GREEK ORTHODOX ARCHDIOCESE OF NORTH AND SOUTH AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To the Supreme Court of the State of New York,
Appellate Division, First Department

REPLY BRIEF FOR PETITIONERS

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[July 30, 2007]

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Reply Brief for Petitioners

I. Respondent's Statement of the Case Focuses on the Irrelevant and Contains Numerous Argumentative Assertions Unsupported by the Record or Contradicted by Facts and Documents in the Record.

A. The first seven pages of the Brief in Opposition, styled "Statement of the Case," are not a statement of the case. They bear not the slightest resemblance to a dispassionate recitation of facts, but are instead an argumentative recital of assertions. Frequently there is no support for these assertions in the record. Indeed, the opening seven pages of the Opposition contains not a single reference to the record or to the petition.

B. When an advocate strays beyond the record, factually erroneous or misleading statements often ensue. This regrettably is the case here. If the Court grants the petition, we will document in the merits briefs many misrepresentations of record evidence indulged in by the Respondent. We offer now a few examples.

1. First, we note *the irrelevant*. In the first paragraph Respondent asserts: "Petitioners seek to dictate the fashion in which the Archdiocese is governed." Opp. 1. A more accurate statement of the record in this case is that Petitioners seek declaratory relief on a *purely procedural matter: the manner of charter revision under generally applicable New York law that governs all hierarchical churches and under specific contractual terms mutually agreed upon by the Archdiocese and the Ecumenical Patriarchate in 1977*. Pet. 5.

Respondent suggests that Petitioners ignore ecclesiastical matters in the purported charter of 2003 "such as providing for the elevation of bishops to the higher rank of Metropolitan, establishing criteria for the elevation of a priest to the position of

Metropolitan or Archbishop, and setting forth rules for the oversight of monasteries." Opp. 1. Far from ignoring these matters, the petition clarified that not one of them is contested by the parties at this stage of the litigation. Hence it is accurate to state: "This case involves *no ecclesiastical question of religious doctrine or canonical discipline*." Pet. 3.

Respondent states: "The only material differences between the 2003 Charter and the 1977 Charter are purely ecclesiastical.... There are no other material differences between the two Charters." Opp. 5-6. These two sentences are inaccurate both for what they omit and for what they imply. They carefully omit the one and only aspect of the 1977 charter that still impels Petitioners to seek a declaration of rights: "whether recent proposed amendments to the Respondent's charter comply with the contractual obligation undertaken by the Archdiocese and the Ecumenical Patriarchate when in 1977 they voluntarily adopted the following procedure for amending the corporate charter or constitution: 'The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress [hereafter CLC] as the need therefor arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification.'" Pet. 3, citing 1977 charter, Art. XXIV. Pet. App. 20a. Respondent's elision of Article XXIV obscures the main point – indeed the only point – at issue in this litigation.

All of the intervening material (numerated (i)-(vi) in Opp. 5-6; see also at 11) describing other contents of the purported charter of 2003 is irrelevant because it repeats the false implication that the parties are in conflict over the nomenclature of ecclesiastical titles for clerics, diocesan boundaries, rules about monasteries, or other matters of a purely ecclesiastical character. Respondent knows full well that neither side is arguing over any of these points. As we noted in the petition: "The only issue here is whether the Archdiocese may proceed with a new charter about such matters without the requisite deliberative process of the [CLC] and without compliance with New York corporation

law to which the church is subject, such as standard elements of due process, including adequate notice...." Pet. 23 n. 14. Thus the nub of this controversy has been reduced to two legal issues: the *failure to comply with generally applicable norms of state law on revision of corporate charters* (which the Archdiocese implicitly accepted when it elected voluntarily to become incorporated under New York law in 1921) and the *breach of contract that occurred when the Ecumenical Patriarchate altered the charter unilaterally*, in violation of the critical procedural text on charter revision (Article XXIV) (which the Archdiocese and the Patriarchate agreed to when they adopt the 1977 charter). Pet. 4.

2. We turn now to *misrepresentations of record evidence.* Respondent falsely asserts that "The Greek Orthodox Church is one of several 'autocephalous,' or ecclesiastically independent, churches of the Eastern Orthodox tradition." Opp. 2. Respondent knows well that the Greek Orthodox Church is *not* an "autocephalous" church, R. 306-23, and that the Patriarchate lacks jurisdiction over any of the four autocephalous churches that, with the Patriarchate, comprise the Greek Orthodox Church, R.281-82, 316, 322-23.

Respondent sometimes states an important truth: "The Greek Orthodox Church is a hierarchical church." Opp. 2. And then Respondent veers off in a direction unsupported in fact and in this record: "ultimate control and authority for all matters within the church rests with the Holy Apostolic and Ecumenical Patriarchate of Constantinople." Id. It begs the central question of this case to imply that the authority of the Patriarchate over "all matters" includes the power to revise the Archdiocesan constitution (charter) unilaterally, and that this power is unconditional in the sense that it need not comply either (a) with generally applicable New York law governing charter revision or (b) with the specific terms of Article XXIV that require approval of a proposed charter by the CLC. Respondent cites no

record support for this claim because the procedural history of the Archdiocesan charters is to the contrary.

Respondent falsely asserts that "The Ecumenical Patriarchate granted the first Charter of the Archdiocese in 1922, and all subsequent Charters." Opp. 4. On the contrary, both the 1922 and 1927 charters of the Archdiocese were adopted first by the CLC and subsequently ratified by the Ecumenical Patriar-chate. R.99, 164, 275-77, 284-96. The 1931 and 1977 charters were proposed by the Patriarchate and subsequently adopted by the CLC. This constant historical practice thus requires not a theological leap, but only a modest empirical historical judgment: when it comes to charter revision, neither the Ecumenical Patriarchate nor the CLC. is the "rubber stamp" of the other. *See* Opp. 14. The approval of both is essential.

Respondent cites Article XXIII of the 1977 charter to support a contrary view, that the Ecumenical Patriarchate has sole authority to "grant a charter." Opp. 12. As Respondent knows full well, however, Article XXIII of the 1977 charter refers to a *draft* document prepared by the Archdiocesan Council, not to a *charter* adopted by the CLC. R. 57, 277-78.

Respondent suggests that our Statement of the Case "rests upon the self-serving and utterly false allegation that the 1977 Charter prohibits the Ecumenical Patriarchate from modifying a proposed Charter before granting it." Opp. 14. *Self-serving*? In our view we serve the Court when we call attention to the one provision in the 1977 charter that is relevant to the questions we presented to the Court. *Utterly false?* How can it be false, let alone utterly so, to identify the portion of the record at the heart of the narrow issue in this litigation? By contrast, throughout the entire Brief in Opposition Respondent ignores generally applicable state law relating to revision of corporate constitutions (charters); it downplays Article XXIV of the 1977 charter (Opp. 14); it distracts the Court from this provision by leading the Court down a blind alley of issues not in contention, (Opp. 1, 6); and it indulges in unseemly attacks upon the bona fides of Petitioners; *contrast* Opp. 6, 11

(Petitioners are "intermeddlers") *with* Pet. 2-3 ("Petitioners are loyal and faithful members" of the Archdiocese and have served often in the CLC, "the highest legislative body of the Archdiocese").

Respondent knows full well that the sole issue of contention in this case is the unilateral elimination of the traditional role played by clergy and laity in the adoption and revision of the constitution (charter) of the Archdiocese. This role is specifically reflected in Article XXIV of the 1977 charter, the only provision as to which Petitioners seek declaratory relief: "*The charter herein may be revised upon the request of the Archdiocesan Clergy-Laity Congress as the need therefore arises. Revisions thereto shall be submitted to the Ecumenical Patriarchate for approval and ratification.*" Pet. App. 21a (emphasis supplied).

C. These errors are not trivial. They violate two cardinal rules of appellate procedure. First, many of these assertions violate the rule that on a motion to dismiss, all facts asserted in the Complaint must be accepted as true and be given the benefit of every possible favorable inference. This rule is not only required under New York practice, Pet. 2, but is also the uniform standard in federal practice, *see, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499 (2007) and hence cannot be ignored in the disposition of this petition.

Second, the unsupported assertions violate the rule against expansion of the factual record developed below; *see, e.g., Adickes v. Kress & Co.*, 398 U.S. 144, 157-58 n. 16 (1970), *Hopt v. Utah*, 114 U.S. 488, 491-92 (1885); *Russell v. Southard*, 12 How. 139, 158-59 (1851). In *Adickes* this Court noted that unsworn submissions such as those inserted into the Brief in Opposition "cannot be properly considered by us in the disposition of the case." 398 U.S. 144, 157-58 n. 16.

Respondent has mischaracterized what remains in dispute. The questions presented do not involve *any* ecclesiastical matters, and do not require the Court to attempt to resolve *any* doctrinal or canonical dispute. The Court should not accept the misrepresentations and distractions from the clean legal

issue in this case. We turn now to the division and confusion among the lower courts on the important issue of church autonomy, which requires the Court's attention.

II. The Reasons for Denying the Petition Offered by the Respondent Misstate Both the Position Argued by Petitioners and the Currently Confused State of the Law in State Tribunals after *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) and *Jones v. Wolf* (1979).

When Respondent turns to the law, its misstatements of our positions and of the state of the law of church autonomy are as egregious as its misstatements of the facts in this case.

A. Respondent characterizes the legal position of the Petitioners as follows: "Ignoring the fundamental notion of separation of church and state, Petitioners ask the civil courts to direct the way in which the Archdiocese governs itself." Opp. 7. On the contrary, Respondent imperils traditional constitutional restraints upon civil courts with respect to religious matters by enticing courts into accepting *theological propositions* about the unconditional authority of the Ecumenical Patriarchate to amend a corporate constitution at will, without regard for the statutory procedures for such amendment or for the role expressly stated for clergy and laity in Article XXIV of the 1977 charter.

By contrast, Petitioners have emphatically urged the wisdom of judicial self-restraint in relation to the rights of religious communities to govern themselves in various ways deemed proper by religious communities. But we respectfully suggest that the time has come for the Court to offer fresh guidance to lower courts about a principled way in which to resolve disputes that arise within religious communities. Repeatedly throughout this litigation we have urged adherence to the century-old practice of deference either to hierarchical or congregational forms of government. We seek to preserve the full value of the free exercise and nonestablishment principles of the First Amendment by insisting that the Court should neither enlarge nor diminish the role traditionally played by priests and laity in

the day-to-day operation of a church, but should simply accept religious communities as it finds them described in documents that they themselves have agreed to. And we note that the Court has disfavored religious claims for judicial immunity from generally applicable norms, such as state law governing all religious corporations and general principles of contract interpretation as they apply to all voluntary agreements, including those of religious communities. *Employment Div. of Oregon v. Smith*, 494 U.S. 872 (1990).

Our position does not, as Respondent suggests, abandon the cases from *Watson v. Jones* to *Jones v. Wolf*. Not one of those cases held that the two principal categories of church governance – hierarchical and congregational – are hermetically sealed or diametrically opposed. Thus a community may be organized on a hierarchical principle, yet may surely agree voluntarily to structure its self-governance according to the laws of a state in which it voluntarily incorporates, and may surely agree to contractual arrangements in its corporate documents that assign important roles to clergy and laity, including a procedure insuring the voice and vote of clergy and laity before revision of the charter or other organic document of the church. That, in fact, is precisely what the Patriarchate and Archdiocese have been doing for decades through a mutual agreement on a procedure requiring meaningful participation of the Patriarchate and the CLC in any revision of the Archdiocesan constitution (charter).

In our view it is not the business of civil courts to make theological judgments on the polity or mode of governance of any religious community, whether hierarchical or congregational." *See, e.g.*, Pet. 25-28. Instead, we have proposed that civil courts should stick to what the Constitution permits and requires: evenhanded treatment of all claimants concerning a breach of contract on aspects of self-governance to which religious communities freely elect to bind themselves by contract – as the Ecumenical Patriarchate and the Archdiocese clearly did by voluntarily agreeing to enter into the charters of 1922, 1927, 1931, and 1977. It is not the

Petitioners, but the Respondent who would diminish religious freedom by their suggestion that no hierarchical community may voluntarily commit itself to a specific way of governing itself that includes meaningful participation of priests and laity in the ongoing life of the church. "Hierarchy" is not so wooden a term that rigid bifurcation of legal categories – (*either* hierarchical *or* congregational) is its only or best safeguard. Nor does the Constitution deny to churches freedom to contract about ways in which they wish to govern themselves.

B. Respondent urges several comforting thoughts on the current state of the law on church autonomy: that the Court's jurisprudence in this area is well settled and the lower court applied it faithfully, Opp. 17-20, that the state appellate courts are not divided on church autonomy, Opp. 20-23, and that the lower court did not intrude into religious matters, Opp. 23-24. Unfortunately, none of these submissions is correct.

1. Respondent claims on the one hand that there is no tension between *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976) (stressing deference to hierarchical authority in a case involving a full-blown canonical dispute) and *Jones v. Wolf*, 443 U.S. 595 (1979) (allowing application of "neutral principles of law" to resolution of secular aspects of intrachurch disputes, whether church polity is hierarchical or congregational). But Respondent runs into trouble as soon as it begins to explain why one case applies in this instance and the other does not. Opp. 8-17. The tension between these cases is currently unresolved, but this tension is reconcilable without overruling either precedent. The probability that the Court can now achieve a more harmonious opinion on church autonomy than it did in either *Milivojevich* or *Jones v. Wolf* makes this case certworthy.

2. Respondent maintains that there is no conflict between the decision of the lower court in this case *prohibiting* any interpretation of Article XXIV of the 1977 charter and the general rule allowing and even *requiring* inspection and interpretation of organic church documents in many other states. Opp. 17-20. Respondent concedes that

"courts may inspect church charters or constitutions and by-laws," at least in "church property disputes." In favor of this "unremarkable proposition" Respondent argues that "the court properly applied the neutral principals [sic] of law doctrine to determine ownership of the property." Opp. 17.

This concession by the Archdiocese has two important consequences for the present proceeding. First, the Archdiocese overlooks the profound connection between the procedural provision on charter revision clearly at issue here and ownership of church property. If, as Respondent suggests, the Ecumenical Patriarchate may revise the corporate constitution (charter) without following the procedures set forth in New York corporation law and without the approval of the CLC, the "highest legislative body of the Archdiocese," Pet. 3, what would impede the Patriarchate from "granting a charter" that would abolish the CLC altogether and require all parishes of the Archdiocese to convey all church property to the Patriarchate?

Second, if neutral principles of law may be used to resolve a property matter, why should they not be used in a contract dispute? When confronted with *Avitzur* v. *Avitzur*, 58 N.Y.2d 108 (1983), in which the New York Court of Appeals used neutral principles of contract law to determine an issue of specific performance of a *religious contract* of marriage, Respondent tries to distinguish *Avitzur* by noting that it "did not involve a decision from the highest authority of a hierarchical church." Opp. 20. Well yes, but that is precisely the flaw of privileging one form of self-governance over another. When we note that the principal difficulty of this position is that it contradicts both free exercise and nonestablishment, Pet. 6-7, 17, 29, Respondent denigrates our view as "frivolous." Opp. 23. On the contrary, we think that it is inconsistent to apply contract law to the *religious law* of a congregational community, but not to a *procedural provision in the instrument of corporate governance* of a hierarchical community. This incoherence can be rectified by reflection on the nondiscrimination principle recently announced by

the Court in other First Amendment contexts. This probability makes this case certworthy.

3. Respondent maintains that the state appellate courts are not divided on the issue of church autonomy. Opp. 20-23. Neither our reading of the cases nor the judgment of commentators, Pet. 10, confirms this rosy portrait of harmony. The petition illustrates only some of the "inconsistency and unpredictability" described by commentators on the church autonomy cases involving disposition of competing property claims. Pet. 13-22. Confident that an independent reading of the cases we cited in the petition will disclose considerable confusion after 28 years of silence by the Court[1] on this issue of national importance, we think that this probability makes this case certworthy.

4. Respondent maintains that the lower court did not intrude into religious matters. Opp. 23-24. One of the most egregious historical and legal errors that the Archdiocese has repeated throughout this litigation is that the Ecumenical Patriarchate has unconditional authority to grant and to revise charters unilaterally, without regard for state law or for its own contractual obligations. Respondent invites this Court to make a leap of faith in its theological judgment. Since this Court has repeatedly warned against excessive entanglements of courts in religious matters, *see Thomas v. Review Bd.*, 450 U.S. 707 (1981), it is likely that the Court will decline the Archdiocese's invitation to meander into the theological thicket, which is unnecessary on this record and impermissible under the First Amendment. This probability makes this case certworthy.

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[1] In the Brief in Opposition, Opp. 23, Respondent misapprehends our comment on the "inattentiveness" of the Court to church autonomy, which clearly referred not to the cases from *Watson v. Jones* to *Jones v. Wolf*, but to the steady denial of certiorari by the Court in all such cases since *Jones v. Wolf*. For ease of reference we list these cases denying certiorari in Appendix A.

Conclusion

For the foregoing reasons and those set forth in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

Church Autonomy Cases in which Certiorari Has Been Denied Since *Jones v. Wolf* (1979)

First Missionary Baptist Church v. Rollins, 199 S.W.3d 823 (Mo. App.2004), *mot. granted and cert. denied*, 167 L. Ed. 2d 244 (No. 06-882, 2007); *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App.324, 605 S.E.2d 161 (2004), *cert. denied*, 126 S. Ct. 350 (2005); *Lott v. East Shore Christian Center*, 908 So. 2d 922 (Ala.), *cert. denied*, 126 S. Ct. 416 (2005); *Kliebenstein v. Iowa Conference of the United Methodist Church*, 663 N.W.2d 404 (Iowa), *mot. granted and cert. denied*, 540 U.S. 977 (2003); *Bhatti v. Singh*, 148 Ohio App.3d 386, 773 N.E.2d 605, *cert. denied*, 537 U.S. 1194 (2003); *Shepherd of the Valley Lutheran Church v. Hope Lutheran Church*, 626 N.W.2d 436 (Minn. App.2001), *cert. denied*, 534 U.S. 1082 (2002); *Arkansas Presbytery of the Cumberland Presbyterian Church v. Hudson*, 344 Ark. 332, 40 S.W.3d 301, *cert. denied*, 534 U.S. 945 (2001); *Shirley v. Christian Episcopal Methodist Church*, 748 So. 2d 672 (Miss. 1999), *cert. denied*, 531 U.S. 821 (2000); *McEnroy v. St. Meinrad School of Theolology*, 713 N.E.2d 334 (Ind. Ct. App.1999); *trans. denied*, 726 N.E.2d 313 (Ind. 1999), *cert. denied*, 529 U.S. 1068 (2000); *East Lake Methodist Episcopal Church, Inc. v. Trustees of the Peninsula-Delaware Annual Conference of the United Methodist Church, Inc.*, 731 A.2d 798 (Del. 1999), *cert. denied*, 528 U.S. 1138 (2000); *Weaver v. Wood*, 2 Mass. L. Rep. 522 (Mass. Super. Ct. 1994), *remanded by* 425 Mass. 270, 680 N.E.2d 918 (1997), *cert. denied*, 522 U.S. 1049 (1998); *Bible Way Church of Our Lord Jesus Christ of the Apostolic Faith v. Beards*, 680 A.2d 419 (D.C. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Croatian*

Roman Catholic Congregation of the Holy Trinity Church v. Wuerl, 447 Pa. Super. 208, 668 A.2d 1151, *cert. denied*, 519 U.S. 1114 (1997); *Mother African Union First Colored Methodist Protestant Church v. Conference of African Union First Colored Methodist Protestant Church*, Civ. Action No. 12055 (Del. Ch. May 16, 1991), *cert. denied*, 519 U.S. 1042 (1996); *Singleton v. Christ the Servant Evangelical Lutheran Church*, 541 N.W.2d 606 (Minn. App.), *cert. denied*, 519 U.S. 870 (1996); *Basich v. Board of Pensions, Evangelical Lutheran Church*, 540 N.W.2d 82 (Minn. App.1995), *cert. denied*, 519 U.S. 810 (1996); *Green v. United Pentecostal Church International*, 899 S.W.2d 28 (Tex. App.1995), *cert. denied*, 517 U.S. 1134 (1996); *Primate & Bishops' Synod of the Russian Orthodox Church Outside Russia v. Russian Orthodox Church of the Holy Resurrection*, 35 Mass. App. 194, 617 N.E.2d 1031 (1993), *aff'd by* 418 Mass. 1001, 636 N.E.2d 211 (1994), *cert. denied*, 513 U.S. 1121 (1995); *American Union of Baptists v. Trustees of the Particular Primitive Baptist Church*, 335 Md. 564, 644 A.2d 1063 (1994), *cert. denied*, 513 U.S. 1111 (1995); *Fortin v. Roman Catholic Bishop*, 416 Mass. 781, 625 N.E.2d 1352, *cert. denied*, 511 U.S. 1142 (1994); *Crocker v. Stevens*, 210 Ga. App.231, 435 S.E. 2d 690 (1993), *cert. denied*, 511 U.S. 1053 (1994); *Korean United Presbyterian Church of Los Angeles v. Presbytery of the Pacific*, 230 Cal. App.3d 480, 281 Cal. Rptr. 396, *cert. denied*, 502 U.S. 1073 (1991); *Williams v. Board of Trustees of Mt. Jezreel Baptist Church*, 589 A. 2d 901 (D.C. 1991), *cert. denied*, 502 U.S. 865 (1991); *Southern Ohio State Executive Offices of Church of God v. Fairborn Church of God*, 61 Ohio App.3d 526, 573 N.E.2d 172 (Greene County 1989), *mot. overruled*, 45 Ohio St. 3d 708, 544 N.E.2d 695 (1989), *cert. denied*, 493 U.S. 1072 (1990); *McDonnell v. Episcopal Diocese of Georgia*, 191 Ga. App.174, 381 S.E.2d 126, *cert. denied*, 493 U.S. 935 (1989); *Presbytery of Beaver-Butler of United Presbyterian Church v. Middlesex Presbyterian Church*, 80 Pa. Commw. 211, 471 A.2d 1271, *rev'd*, 507 Pa. 255, 489 A.2d 1317, *cert. denied*, 474 U.S. 887 (1985); *York v. First*

Presbyterian Church, 130 Ill. App.3d 611, 474 N.E. 2d 716 (1984), *cert. denied*, 474 U.S. 865 (1985); *Reid v. Gholson*, 229 Va. 179, 327 S.E. 2d 107 (1985), *cert. denied*, 474 U.S. 824 (1985), *reh'g denied*, 474 U.S. 1014 (1985); *Presbytery of Elijah Parish Lovejoy v. Jaeggi*, 682 S.W.2d 465 (Mo. 1984), *cert. denied*, 471 U.S. 1117 (1985); *First Presbyterian Church of Schenectady v. United Presbyterian Church*, 62 N.Y.2d 110, 476 N.Y.S.2d 86, 464 N.E. 2d 454, *cert. denied*, 469 U.S. 1037 (1984); *Grace Evangelical Lutheran Church v. Lutheran Church-Missouri Synod*, 118 Ill. App.3d 151, 73 Ill. Dec. 789, 454 N.E.2d 1038 (1st Dist. 1983), *cert. denied*, 469 U.S. 820 (1984); *Struemph v. McAuliffe*, 661 S.W.2d 559 (Mo. App.1983), *cert. denied*, 467 U.S. 1216 (1984); *Grutka v. Clifford*, 445 N.E.2d 1015 (Ind. App.), *cert. denied*, 465 U.S. 1006 (1984); *Presbytery of Baltimore of United Presbyterian Church v. Babcock Memorial Presbyterian Church*, 52 Md. App. 428, 449 A.2d 1190 (1982); *aff'd* 296 Md. 573, 464 A.2d 1008 (1983), *cert. denied*, 465 U.S. 1027 (1984); *Protestant Episcopal Church v. Barker*, 115 Cal. App.3d 599, 171 Cal. Rptr. 541 (1981), *cert. denied*, 454 U.S. 864 (1981); *Newark v. Burns*, 83 N.J. 594, 417 A.2d 31 (1980), *cert. denied*, 449 U.S. 1131 (1981), *reh'g denied*, 450 U.S. 1027 (1981); *Protestant Episcopal Church v. Graves*, 83 N.J. 572, 417 A.2d 19, *cert. denied*, 449 U.S. 1131 (1981); *Galich v. Catholic Bishop*, 75 Ill. App.3d 538, 394 N.E.2d 572 (1st Dist. 1979); *cert. denied*, 445 U.S. 916 (1980); *Trinity Presbyterian Church v. Tankersley*, 374 So. 2d 861 (Ala. 1979), *cert. denied*, 445 U.S. 904 (1980); *Wheeler v. Roman Catholic Archdiocese of Boston*, 378 Mass. 58, 389 N.E.2d 966 (1979), *cert. denied*, 444 U.S. 899 (1979).